THE

NEW LAW REPORTS

OF CASES DECIDED BY

The Supreme Court of Ceylon,

The Court of Vice-Admiralty in the Island, and Her Majesty the Queen in Her Privy Council on appeal from the Supreme Court of the Island.

WITH INDEX.

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VOLUME I.

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Volume I.

PAGE

Acquittal—
When discharge should be treated as : *See* CRIMINAL PROCEDURE, 16.

Added party—
Application to be made : *See* CIVIL PROCEDURE, 10.

Adding parties—
In partition suit : *See* PARTITION.

Additional Police Court—
See CRIMINAL PROCEDURE, 11.

Administration—
Of whole of common estate of two spouses on death of one : *See* HUSBAND AND WIFE.

Administration of justice—
Administration of justice by Magistrates—Inexpediency of a Superintendent of Police trying, as Police Magistrate, complaints of street nuisances and resistance to the Police.

The Superintendent of Police for the Province of Uva had been appointed Additional Police Magistrate of the Police Court of Badulla. There having been complaints of street nuisances in the town of Badulla the Superintendent gave orders that all offenders should be arrested and prosecuted. Acting upon these orders a police officer arrested appellant without a warrant for committing a nuisance in his view ; and as appellant resisted the arrest, he charged him with not only committing a nuisance, but obstructing him in the execution of his duty. Appellant was brought before the Superintendent sitting as Additional Police Magistrate, tried by him, and convicted on both charges.

Held, by Bonser, C.J., that the conviction could not stand. The principle applicable to a case like this is that the administration of justice by Magistrates should be clear from all suspicion of unfairness. That justice should be believed by the public to be unbiassed is almost as important as that it should be in fact unbiassed.

Per Lawrie, J.—An officer of the police cannot take part either as judge or investigating Magistrate in cases in which members of the police are personally interested, the disqualification being not that the Magistrate has a direct interest, but that the parties before him are those over whom he has control, and in the maintenance of whose position and authority he is interested.

Lawrie, J., would however sustain the conviction for committing nuisance, the Magistrate having had no interest in the prosecution for that offence either of a personal or pecuniary nature, and no bias either against or in favour of the accused.

RODE *v.* BAWA, Police Court, Badulla, 16,009 .. 373

Digitized by Google

Admission— PAGE
Conviction on: *See* CONTEMPT OF COURT, 1.
Of offence, how to be recorded: *See* CRIMINAL PROCEDURE, 11.

"Advances"—
Meaning of: *See* COOLIES, &c.

Agreement—
To repay loans for procuring coolies: *See* COOLIES, &c.

Alienation—
By wife of property of common estate: *See* CHRISTIAN MARRIAGE.

Alimony—
See DIVORCE.

Alteration—
Of record: *See* CONTEMPT OF COURT, 1.

Amended plaint—
See CIVIL PROCEDURE, 3.

Answer—
Time for filing: *See* CIVIL PROCEDURE, 17.

Appeal—
See CIVIL PROCEDURE, 11 and 18; CRIMINAL PROCEDURE, 2.
After plea of guilty: *See* CRIMINAL PROCEDURE, 8 and 11.
Computation of time for: *See* CRIMINAL PROCEDURE, 7.
Delay in forwarding petition: *See* CIVIL PROCEDURE, 21.
From decision of Forest Settlement Officer: *See* FOREST ORDINANCE, 2.
To enhance punishment: *See* CRIMINAL PROCEDURE, 17.
To Privy Council: *See* CIVIL PROCEDURE, 24.

Appearance—
In Court: *See* CIVIL PROCEDURE, 11.

Application—
(Second) for writ: *See* CIVIL PROCEDURE, 32.

Arbitration—
See CIVIL PROCEDURE, 6.

Arrack—
1. ——— *Ordinance No. 10 of 1844, ss. 33 and 36—Neglect to grant permit for removal of arrack—Discretion of persons authorized to grant permit.*

Under sections 33 and 36 of the Ordinance No. 10 of 1844 a licensed retail dealer in arrack is no more bound than the Government Agent is to grant a permit for the removal of arrack. They have a discretion to grant or withhold it according to circumstances.

The punishment provided in section 36 is in respect of those who attempt to exercise this discretion for reward or gratuity.

THE QUEEN *v.* FERNANDO *et al*, Police Court, Nuwara Eliya, 8,729 46

2. ——— *Arrack flavoured by drugs and spices—Ordinance No. 10 of 1844, s. 37, and Ordinance No. 13 of 1891, s. 10—Removal without permit.*

The removal, without permit, of arrack which has been so highly impregnated or flavoured by drugs or spices that a distillation did not deprive the compound of their taste and flavour, and which was not proved as useful for medical purposes only, is punishable under Ordinance No. 13 of 1891, section 10, and Ordinance No. 10 of 1844, section 37.

PIERIS *v.* LIVERA, Police Court, Colombo, 33,867 .. 337

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Arrest— PAGE

Defective warrant of arrest—Competency of a police headman as public servant to arrest a person charged with robbery, independently of a warrant—Causing hurt to such servant—Plea of private defence.

Causing hurt to a police headman, while in good faith and under colour of his office he was executing a defective warrant of arrest upon a person charged with robbery, is an offence under section 323 of the Penal Code.

And in the absence of any act on the headman's part to cause reasonable apprehension of death or grievous hurt, the right of private defence cannot be availed of against an arrest made by such public servant, who believed *bonâ fide* that he had the power to make the arrest.

QUEEN *v.* PODI BABA, District Court (Criminal), Kalutara, 618 23

Assignee's report—

See INSOLVENCY.

Attorney-General—

Power of, under sections 241–243 of the Criminal Procedure Code : *See* CRIMINAL PROCEDURE, 13.

Bagatelle—

See GAMING, 2.

Bill of lading—

Unauthorized by master of ship : *See* SHIPPING, 2.

Birth—

Evidence of : *See* CIVIL PROCEDURE, 33.

Brothel—

Ordinance No. 5 of 1889—Keeping a brothel—Evidence.

In a prosecution under Ordinance No. 5 of 1889, for keeping a brothel, it was proved that a number of women occupied the place alleged to be a brothel, and that men of all sorts visited it both during the day and by night, and that spirits were drunk on the premises, and that there were fights among the people resorting thereto; but there was no evidence of any act of indecency or fornication.

Held, that the place was not a brothel within the meaning of Ordinance No. 5 of 1889.

A brothel is a place to which persons of both sexes have recourse for the purpose of prostitution.

PIERIS *v.* FERNANDO *et al.*, Police Court, Colombo, 38,081 212

Brute animal—

Injury by hunting dogs—Liability of owner for damages—Direct and consequential damages.

The owner of a pack of hunting dogs, which killed a calf while standing loose on a high road, is liable in damages to the owner of the calf.

The damages may include not only the value of the calf, but also the loss of milk consequent upon the death of the calf.

Folkard v. Anderson (*Rámanáthan's Reports, 1862, p. 68*) commented upon.

Per Bonser, C.J.—There seems to be no justification for the proposition stated in *Folkard v. Anderson* that the amount of compensation should not exceed the value of the animal which caused the injury.

THWAITES *v.* JACKSON, Court of Requests, Nuwara Eliya, 882 154

Digitized by Google

PAGE

Buddhist priest—
See GUARDIANSHIP.

Burden of proof—
See PETROLEUM ; EVIDENCE, 3.

Cause of action—
Splitting of : *See* JOINT LESSORS.

Caveat—
See CIVIL PROCEDURE, 22.

Certificate—
Of birth, what it is evidence : *See* CIVIL PROCEDURE, 33.
Of curatorship : *See* CIVIL PROCEDURE, 1.
Of exemption from toll : *See* TOLL.
Of title—*Ordinance No. 5 of 1877, ss. 31, 32—Certificate of title —Effect thereof—Setting aside such certificate—Necessity for entry of name of administrator instead of his intestate— Ordinance No. 14 of 1891, s. 26.*

The object of a certificate of title granted under section 31 of Ordinance No. 5 of 1877 is to make it, unless and until it is impeached by an action under section 32 thereof, conclusive evidence of the title of the holder of such certificate to the land referred to therein ; and the certificate is a bar to the assertion by any one of any claim to such land, which arose or accrued prior to the date of the certificate, and which might have been registered ; and it is a bar to the claims of persons as well in as out of possession of the premises.

Any one seeking to set aside such certificate need not resort to a separate action, but that object may be gained by means of a claim in reconvention under section 32 of the Ordinance, in an action already filed against him.

Every administrator should get himself placed on the register kept under Ordinance No. 5 of 1877, as required by section 26 of Ordinance No. 14 of 1891, in place of his intestate and his failure to do so will, under section 31 of Ordinance No. 5 of 1877, operate as a bar to any claim by him as administrator.

Cassim v. Marikar (*1 S. C. R. 185*) questioned.

PIERIS APPUHAMI *v.* BOTEJU, District Court, Colombo, C/2,482 329

Under section 781 of the Civil Procedure Code, preliminary to appeal to Privy Council : *See* CIVIL PROCEDURE, 24.

Cestui que trust—
See TRUSTEE.

" Chambers "—
What it includes : *See* " COURT."

Charters—
Of 1801 and 1833 : *See* DIVORCE.

Chena cultivation—
Clearing land for : *See* FOREST ORDINANCE, 1.

Chief officer of ship—
Receipt of cargo by : *See* SHIPPING, 2.

Christian marriage—
*Christian marriage—Non-registration—Ordinance No. 6 of 1847 —*Rei vindicatio*—Alienation by wife of property in community without knowledge of husband—Estoppel—Claim by heir to property invalidly sold to third party—Right of such party to plead the* exceptio rei venditæ et traditæ*—*Jus retentionis*— Rules as to* impensæ utiles.

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The 4th section of the Ordinance No. 6 of 1847 came into operation when Her Majesty's confirmation of the Ordinance was notified in the *Government Gazette* of 8th December, 1849. PAGE

A marriage solemnized by a minister of the Christian religion under the provisions of that section does not become null and void for want of registration.

A wife, who lives apart from her husband by mutual consent, cannot validly alienate property belonging to the marriage community.

Semble, per Bonser, C.J.—If the husband knew of the sale by his wife and raised no objection to its completion, he would be estopped from denying its validity.

Per Bonser, C.J., and Withers, J. (*dissentiente* Browne, A.J.).—A claiming as heir of B a moiety of a property which B in her lifetime had sold and delivered, without the knowledge of her husband, to C for value, may be successfully opposed by C pleading the *exceptio rei venditæ et traditæ*.

Where a possessor, who has made improvements on a land believing it to be his own, sells it with the improvements thereon to another, he must be taken to have sold with the land the right to such improvements, and with them the right to defend possession of them by every available means, among which is the *jus retentionis* till the *impensæ utiles* are refunded.

The *jus retinendi* passes in the sale from one *bonâ fide* possessor to the other without a special cession.

The money which a *bonâ fide* possessor pays in discharge of a mortgage, which encumbered the property when it came into his hands, is *utilis impensæ*.

The rules as to the extent to which the *impensæ utiles* can be recovered from the owner are :—

(1) When the outlay has exceeded the permanent advantage to the property, the owner is only liable to the extent to which the property has really been rendered more valuable by them.

(2) And not even to that amount if the outlay has been very much greater than the owner would himself have made ; in which case, it is left for the judge to determine on a consideration of all the circumstances and persons how much should be recovered.

(3) If at the time of the suit the improved value of the property caused by the expenditure exceeds the amount so laid out, still only the sum actually expended can be recovered from the owner.

(4) When a claim is made for compensation, an account has to be taken of the mesne profits received ; and only so much of the expenditure, whether made on the production of the fruits or on the property itself, as exceeds the amount of these profits or *fructus* can be allowed, subject, however, to the preceding rules.

(5) And in taking this account, fruits which have been consumed as well as those which are still extant must be set off against the clause for expenditure. The fruits of the expenditure itself however—*fructus ex ipsa melioratione percepti*—are to be excluded from the accounting and not be set off against the claim.

Nicholas de Silva *v.* Shaik Ali, District Court, Colombo, C/5,684 228

Civil procedure—

1. ——— *Civil Procedure Code, ss. 481 and 582—Appointment of next friend under s. 481—Certificate of curatorship under s. 582—Necessity for inquiry as to value of minor's property upon application for appointment of next friend.*

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PAGE

A person who has been regularly appointed as next friend under section 481 of the Civil Procedure Code has a right to sue without a certificate of curatorship under section 582.

Per Browne, J.—A certificate of curatorship is necessary only for actions instituted (or defended) by a curator in his own name *qua* curator, and is not necessary for actions instituted (or defended) by a minor by his next friend or guardian *ad litem*.

In regard to the proviso of section 582, when application is made for the appointment of next friend or guardian, it is not necessary to inquire into the value of the minor's property. Such inquiry is necessary only when it is sought to appoint a curator generally, or for the limited purpose contemplated by that section.

Per Withers, J.—If a next friend claims charge of a minor's property of the value of Rs. 1,000 or over for any of the reasons stated in section 582, he cannot institute an action with reference to that property, unless he first takes out a certificate of curatorship.

D. C., Kégalla, 160 (*2 S. C. R. 81, 3 C. L. R. 26*), commented upon.

UDUMA LEBBE *v.* SEYADU ALI, District Court, Kurunégala, 857 1

2. ———— *Fiscal's conveyance to purchaser in execution sale—Ordinance No. 4 of 1867, ss. 54, 56, and 58—And Civil Procedure Code, ss. 283 and 286—Confirmation by Court—Proper time for conveyance.*

Upon a sale in execution duly held in 1871 under Ordinance No. 4 of 1867, and no objection having been taken thereto within thirty days of the sale—

Held, per Withers and Browne, J.J. (Lawrie, A.C.J., *dissentiente*), that it was competent to the Fiscal to pass conveyance to the purchaser in 1893, and that such conveyance was valid. Such purchaser not being execution-creditor, an express order of court to convey is not necessary.

Held further, *per* Withers, J., that it was only sales of property held after the Civil Procedure Code came into operation that required an order of confirmation as a condition precedent to a Fiscal's conveyance.

GABRIEL *v.* PELIS PERERA, District Court, Negombo, 1,355 6

3. ———— *Civil Procedure Code, s. 247—Plaint presented within time, but rejected—Irregularity of accepting fresh plaint as amended plaint, though out of time.*

No action solely and exclusively under section 247 of the Civil Procedure Code can be maintained if instituted more than fourteen days after the date of the order upholding the claim to the property seized in execution.

If a plaint is rejected, and is not put on the file of the Court, it cannot be said to constitute the institution of an action.

SILVA *v.* DINEKEHAMY, District Court, Galle, 3,285 .. 19

4. ———— *Civil Procedure Code, chapter XLVII.—Power of Court to vacate an order of sequestration made on* ex parte *motion.*

A District Judge can, on good cause shown by the party aggrieved, vacate an *ex parte* order of sequestration which has been made at the instance of the plaintiff, under the provisions of chapter XLVII. of the Civil Procedure Code.

MUTIAH *v.* MUTTUSAMY, District Court, Chilaw, 965 .. 25

5. ———— *Practice Conduct of trial—Tender of evidence—Judge's refusal to admit it—Necessity for recording refusal*

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and reasons therefor—When such refusal is good ground for granting a re-hearing of case. PAGE

A party accepting a Judge's ruling or opinion as regards the relevancy of evidence which he proposes to offer, without making any effort to produce it, takes the risk upon himself of losing the case for want of such evidence.

If a Court refuses to take any evidence tendered, counsel should not submit to such refusal, but should either call the witnesses, propose the questions to be put to them, and have the reasons for the Judge's refusal recorded, or should ask him to record that he would not entertain any evidence on the point in question.

MUTTUSAMY *v.* PONNEN, District Court, Kandy, 8,064 31

6. ———— *Reference to arbitration—Power of Court to extend time after expiry of the time originally fixed—Civil Procedure Code, s. 683.*

Under section 683 of the Civil Procedure Code, a Court may enlarge the time, on cause shown, when the time originally allowed for the making of the award has expired.

PUNCHIRALA *v.* SUDDAHAMY, District Court, Kurunégala, 718/499 38

7. ———— *Civil Procedure Code, chapter LIII.—Summary procedure on action on promissory note and claim for money lent—Right to summons thereon—Leave to defendant to appear and defend—Power of Court to call on defendant to give security.*

The summary procedure allowed by chapter LIII. of the Civil Procedure Code is applicable only to actions in which the claim is for money due upon certain classes of documents.

When a plaintiff has a second cause of action as for money lent he is not entitled to a summons in the form No. 19, and the plaint should be returned for amendment.

If a defendant shows sufficient cause why the decree passed against him for default of appearance should be set aside, he is entitled to be allowed to enter into his defence, and he cannot be called upon to give security except for good reasons.

ALLIE *v.* MOHIDEEN, District Court, Colombo, 5,454 .. 39

8. ———— *Civil Procedure Code, ss. 542 and 543—Prosecution for not reporting death—Duty of "next of kin"—Ordinance No. 18 of 1867, s. 18—Absence of fraud.*

Where a deceased left property exceeding Rs. 1,000 and minor children, a prosecution for not reporting his death under section 543 of the Civil Procedure Code does not lie against the adult brothers of the deceased.

It is only when some fraud has been perpetrated that the provisions of sections 542 and 543 of the Civil Procedure Code should be enforced.

The best working provision regarding the reporting of deaths is to be found, not in section 542 of the Code, but in Ordinance No. 18 of 1867, section 18.

MUDIANSE KORALA *v.* APPUHAMY, Police Court, Kégalla, 12,519 47

9. ———— *Civil Procedure Code, s. 219—Order of Court upon judgment-debtor for attendance and examination—Disobedience of order—Liability of debtor to be punished for contempt of Court under chapter XVII. of the Code.*

Disobedience by a judgment-debtor of an order made under section 219 of the Civil Procedure Code to attend Court for examination is not punishable as a contempt of Court under chapter XVII. of the Code.

ANNAMALAY CHETTY *v.* GUNERATNE, District Court, Negombo, 751 49

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10. ——— *Civil Procedure Code, s. 18—Application to be made added party—Diversity of interest between plaintiff and applicant—Interpleader—Duty of Colonial Courts to follow decisions of Court of Appeal on Imperial Statutes where such Statutes are identical with Colonial Statutes.* PAGE

Section 18 of the Civil Procedure Code corresponds with the language of Rule 11, Order XVI., of the Supreme Court of England, and in the interpretation of that section effect must be given to the principle that, wherever a Court can see in the transactions brought before it that the rights of some of the parties may or will be probably affected, so that under the former system of law there might have been several actions brought in respect of the same transaction, the Court shall have power to bring all the parties before it and determine all their rights by one trial, in order that the cost of litigation may be diminished as much as possible.

If the interest of the person applying to be added party is adverse to and independent of the plaintiff's, the defendants might interplead and retire, leaving the deposit to be contested between the two rival claimants, or the applicant should be added a defendant, if added at all, and should put in a defence and counter-claim to the sum in deposit.

When the provisions of the Colonial Statute are identical with those of an English Statute, the Colonial Courts should follow the decisions of the Court of Appeal on the Imperial Statute.

MEIDEEN *v.* BANDA (WALATAPPA CHETTY, Claimant), District Court, Kurunégala, 792 51

11. ——— *Civil Procedure Code, ss. 86 and 87—Appeal against decree absolute for default—" Appearance " in Court —Decree made absolute after appearance and showing of insufficient cause.*

Held, per Lawrie, A.C.J., and Withers, J. (Browne, J., *dissentiente*), that a decree *nisi* made absolute in the presence of a defendant, who appeared and attempted to show cause against it, is nevertheless a decree absolute for default, and hence not appealable.

Held, per Lawrie, A.C.J., that the mere bodily presence of a defendant in Court is not " appearance." It must be an appearance on the proper day, and if being absent on that day he comes into Court either personally or by Proctor on a later day, his non-appearance on the proper day must be accounted for before the late coming can be accounted an " appearance " in the legal sense.

Held, per Browne, J. (*dissentiente*), that the term "appear" in sections 85-87 of the Civil Procedure Code means the first formal presentation of himself by the defendant to the Court in person or by proxy ; and that "decree absolute for default" in section 87 means " for entire default of appearance prior to entry thereof."

D. C., Badulla, 370, *Natchiappa Chetty v. Muttu Kangany* (*2 C. L. R. 110*), considered and followed.

SILVA *v.* GRERO, District Court, Colombo, 5,601 .. 67

12. ——— *Civil Procedure Code, s. 241—Claim to property seized in execution—Life-interest of claimant.*

Where a seizure in execution had been made of certain lands under a decree which declared them to be specially bound and executable, subject to the life-interest of one D.P. in them, and D. P. applied to the District Court that her claim to have the seizure released and the property declared not liable to be seized and sold in execution be investigated under section 241 of the Civil Procedure Code :

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Held, that it was not competent to the District Court to refer the claimant to a separate action, but that her claim was one to be investigated and determined under sections 241 and 242. PAGE

MURUGAPPA CHETTY *v.* SAMARASEKARA *et al.* (PAVISTINAHAMI, Claimant), District Court, Negombo, 1,178 100

13. ——— Rei vindicatio—*Alternative decree for delivery of articles or payment of their value—Action of detinue—Civil Procedure Code, ss. 191, 320, and 321.*

Where, in an action raised for specific delivery of certain articles wrongfully detained, or for payment of their value, defendant admitted possession of some of the articles and claimed a certain sum of money from the plaintiff on a separate account, and the Court decreed that defendant do return to the plaintiff the articles admitted by him, or pay plaintiff their value, and that defendant do further pay plaintiff Rs. 25·50, being the difference between the value of certain articles claimed by plaintiff and the amount found to be due by plaintiff to defendant—

Held, that such a decree was unworkable and irregular.

Held, also, that in an action *rei vindicatio* for recovery of specific movable property, an alternative decree for payment of its value is bad.

The English action of detinue is inconsistent with sections 320 and 321 of the Civil Procedure Code, and section 191 does not authorize the alternative form of decree entered.

SITHAMBARAPPILLAI *v.* VINASITAMBY, District Court, Jaffna, 24,691 114

14. ——— Rei vindicatio— *Form of decree—Detinue—Civil Procedure Code, ss. 191, 320–322.*

Though in an action of detinue decree for delivery of the articles claimed or payment of their value is admissible, yet such an alternative decree is not regular in an action *rei vindicatio*, the question of compensation arising only when it is ascertained that the property could not be restored, and the amount of compensation being dependent on the conduct of the defendant.

Per Bonser, C.J.—Sections 320–322 of the Civil Procedure Code seem to be in accordance with the Roman-Dutch Law and practice, and section 191 should be disregarded as being inconsistent with the later portions of the Code.

Sithambarappillai v. Vinasitamby (*ante*, page 114) followed.

SHEIK ALI *v.* CARIMJEE JAFFERJEE, District Court, Colombo, 4,850 117

15. ——— *Bill of costs—Taxation—Civil Procedure Code, s. 214—Claim proceedings under s. 241—Determination of class.*

The class of a claim proceeding under section 241 of the Civil Procedure Code is determined either by the value of the property claimed or the amount of the decree, whichever is the less, and the bill of costs of such proceeding should be taxed according to the class so determined.

Per Browne, J.—A Court has power under sections 244–246 of the Civil Procedure Code to make order as to payment of costs.

Adamjee v. Cadar Lebbe, D. C. Colombo, No. 98,031 (*1 C. L. R. 66*), distinguished.

CANDEPERUMAL *v.* SINNATAI *et al.* (ISMA LEBBE MARIKAR, Claimant and Appellant), District Court, Batticaloa, 24,176 128

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PAGE

16. ——— *Civil Procedure Code, chapter XL.—Application for guardianship—Sale of minor's property by guardian—Powers of guardians.*

The Civil Procedure Code does not limit the powers conferred on guardians by the Roman-Dutch Law.

A guardian may sell immovable property with the sanction of the Court.

Such sale should be by public auction with a reserve price put upon the property by Court, which should also give directions as to the manner of sale and of the investment of the proceeds thereof.

A mother, married in community and surviving her husband, has a preferential right to be appointed as a guardian of her children, but some other person should be named by the Court to act with her, so as to safeguard the interests of the children.

MANA PERERA, Petitioner, and PERERA APPUHAMY, Respondent (*re* ABRAHAM and ELIAS DE MELL, Minors), District Court, Kalutara, 51 140

17. ——— *Civil Procedure Code, s. 74—Answer—Time for filing.*

Section 74 of the Civil Procedure Code doe not contemplate only one extension of time for filing answer, the words "at any subsequent time" of that section being intended to meet a case of more than one extension.

SILVA *v.* BABAHAMY, District Court, Galle, 2,980 .. 145

18. ——— *Practice—Appeal—Insolvency proceedings—Security for appeal costs—Ordinance No. 7 of 1853, s. 6—Rules and Orders of 1833—Civil Procedure Code, s. 756.*

The provisions of the Civil Procedure Code, 1889, relative to the giving of security for the respondent's costs of appeal do not apply to appeals from orders in insolvency cases.

Re insolvency of Philippo (*D. C., Colombo, 1,697*), *9 S. C. C. 120*, overruled.

Re INSOLVENCY OF ABDUL AZIZ, District Court, Galle, 258 196

19. ——— *Civil Procedure Code, s. 247—Action by execution-creditor—His incompetency to prove prescription—Title of execution-debtor—Ordinance No. 22 of 1871, s. 3—Meaning of "possession" therein—Roman-Dutch Law as to prescription.*

It is not competent for an execution-creditor, who in an action under section 247 of the Civil Procedure Code was seeking to have it declared that certain immovable property, which had been released by order of Court from seizure under a writ of execution of a judgment held by him, was available for levy as his judgment-debtor's property, to lay a foundation of title in his debtor to the property sought to be so levied, by proving ten years' adverse and uninterrupted possession by his debtor of the property, immediately previous to the seizure in execution, in accordance with the requirements of the Ordinance No. 22 of 1871.

The "possession" contemplated in section 3 of Ordinance No. 22 of 1871 is that of a party to a suit, or of his predecessor in title, but not that of a third party.

The effect of the Ordinances 22 of 1871 and 8 of 1834 is to sweep away all the Roman-Dutch Law relating to the acquisition of immovable property by prescription, except as regards the property of the Crown.

TERUNNANSE *v.* MENIKE, District Court, Badulla, 746 200

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20. ———— *Right of lessee to the action* rei vindicatio *or to a possessory action as against lessor—Civil Procedure—Motion for summons—Motion to forward case in appeal.* PAGE

A notarial lease is a *pro tanto* alienation, and gives the lessee during his term the legal remedies of an owner and possessor.

When a plaint is accepted by the Court, there is no necessity for a separate motion for summons, nor is a motion to forward the case in appeal necessary after the filing of the petition of appeal.

GOONEWARDANA *v.* RAJAPAKSE, District Court, Colombo, letter C 217

21. ———— *Appeal—Delay in forwarding appeal—Insolvency Ordinance—Civil Procedure Code, s. 438—Description of insolvent—Debt of petitioning creditor—Motion for annulment of adjudication of insolvency—Technical objections.*

A District Judge has no right to delay the forwarding of a case in due course to the Supreme Court after the appeal has been perfected.

It is sufficient if a petitioning creditor's debt is proved in accordance with the form in the schedule to the Insolvency Ordinance.

The Civil Procedure Code does not affect proceedings under the Insolvency Ordinance, and an affidavit proving a debt in insolvency proceedings need not, therefore, be in accordance with section 438 of the Code, but may follow the form given in the schedule to the Ordinance.

In a petition to have a person declared insolvent it is not sufficient to state his name only, but his description and address should be given.

One of several partners of a firm having petitioned to have a person declared insolvent on the footing of a debt due to the firm, it was objected that the petition was irregular, inasmuch as the debt was not due to the petitioner only, and that he should have produced the power of attorney authorizing him to sign for the firm :

Held, that the objections were too technical to be given effect to, in the absence of some injustice suffered on the merits.

One partner of a firm may sign such petition for himself and on behalf of the others without a power of attorney from the latter.

HAYMAN THORNHILL, Insolvent, District Court, Colombo, 1,822 243

22. ———— *Formal order of Court—Probate—Caveat—*Ex parte *order—Notice of appeal—Civil Procedure Code, ss. 535 and 536—Useless motions.*

An order to be treated as such must be formally drawn up and recorded as required by the Civil Procedure Code.

After an order absolute in the first instance under section 529 of the Civil Procedure Code granting probate of a will to an applicant has been made, it is too late to enter a caveat under section 535.

If the probate has been granted wrongly, it may be recalled under section 536.

Such an order upon a motion, notice whereof was not given to any person, is an *ex parte* order, although it was made after such person had appeared and opposed the motion, and no notice is necessary to be given to such person of an appeal preferred by the applicant.

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When an application for probate is once allowed, there is no necessity for further motion that probate do issue to the applicant. PAGE

Re Last Will, FERDINANDUS, District Court, Colombo, C 570 245

23. ———— *Civil Procedure Code, s. 642—Application of mortgagee to have deceased mortgagor's estate represented—Estate under Rs. 1,000—Death of mortgagor before Code came into operation.*

Under the proviso of section 642 of the Civil Procedure Code, it is competent for the District Court, upon an application made in respect of a mortgage of less value than Rs. 1,000, to appoint a person to represent the deceased mortgagor's estate for the purposes of the action intended to be raised for the recovery of the mortgage debt.

The proviso stands independently of the testamentary chapters of the Code, and applies to cases where the deceased had died before as well as after the Code came into operation.

SOYSA *v.* ALWIS, District Court, Colombo, M 5 .. 255

24. ———— *Civil Procedure Code, s. 781—Application for certificate as to fulfilment of requirements of s. 42 of the Courts Ordinance—Plaint for injunction and damages—Value of subject-matter in issue.*

Where, in an action raised to restrain the defendant from trading under a certain name and to recover Rs. 9,000 as damages consequent upon the use of such name, no value was assigned in the plaint to the use of such name, and no issue relating to damages was framed, nor any attempt made to prove damage at the trial, and the dismissal of plaintiffs' case was affirmed by the Supreme Court—

Held that, under section 42 of The Courts Ordinance, the value of the subject-matter of the suit was to be determined by the statement in the plaint, whether proved or not, and that a party desiring to appeal to Her Majesty in Her Privy Council was entitled to the certificate referred to in section 781 of the Civil Procedure Code.

DELMEGE *et al. v.* DELMEGE, District Court, Colombo, C/4988 271

25. ———— *Action by secretary of a voluntary association—Inadmissibility of technicalities of law in Courts of Requests—Right of plaintiff to sue—Motion to take plaint off the file—Proper mode of dealing with the question of right to sue—Civil Procedure Code, s. 16—Costs.*

A voluntary association cannot by agreement between its members give any individual the right to sue on their behalf.

Where it is practically impossible for a body of numerous members to appear as plaintiffs, the Court may make an order under section 16 of the Civil Procedure Code, permitting one or more of such members to sue on behalf of the rest.

It is not the duty of a Judge to throw technical difficulties in the way of administering justice. He ought to remove them out of the way upon proper terms as to costs and otherwise.

In a Court of Requests all technicalities of law should be avoided.

When a plaint, defective in some material respect, has been filed, it is not necessary to move that it be taken off the file, but it is the duty of the Court, of its own accord, or upon its attention being called, to reject the plaint or return it to plaintiff for amendment. If the plaint is good *ex facie*, any objection thereto must be taken by the answer.

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Where defendant, a member of a voluntary association, objected at the trial to the reception of certain rules made by the association, on the ground that such rules were not included in any list of documents filed by the plaintiff— PAGE

Held, that defendant should be deprived of his costs in the Court below.

READ *v.* SAMSUDIN, Court of Requests, Colombo, 8,823 292

26. ———— *Principal and agent—Power of attorney to minor—Civil Procedure Code, s. 24.*

A minor holding a general power of attorney for his principal abroad is competent to act as his agent for the limited purposes mentioned in section 24 of the Civil Procedure Code.

SOMASUNDARAM *v.* IBRAHIM SAIBU, District Court, Chilaw, 1,173 297

27. ———— *Revisionary power of Supreme Court—Civil Procedure Code, s. 753—Liability of execution-creditor for act of Fiscal—Necessity of surrender before seizure, of property pointed out by the judgment-debtor—Civil Procedure Code, s. 226.*

An order of a District Court, which is wrong *ex facie*, may be quashed by the Supreme Court in the exercise of its revisionary power, even though no appeal may lie against such order.

An execution-creditor who did not authorize the Fiscal to seize under his writ certain property, which upon seizure was rightly claimed by a third party, cannot be condemned to pay the costs of the claim proceeding.

A Fiscal is not entitled to seize property pointed out by the judgment-debtor until it has been surrendered to him.

RANESINHE, Creditor and Appellant.

HENRY *et al.*, Claimants and Respondents, District Court, Galle, 2,907 (*A*) 303

28. ———— *Civil Procedure Code, ss. 542, 543—Wilful omission to report death of intestate—" Duty of widow, widower, or next of kin."*

In order to sustain a charge under section 543 of the Civil Procedure Code, it is necessary to prove that the accused are the lawful widow or next of kin of the deceased ; that he died intestate ; and that the accused wilfully omitted to report his death.

Semble, per Lawrie, J.—The 542nd section makes the widow *or* the next of kin liable. The duty seems first to be laid on the widow, and if there be no widow, then on the next of kin. Therefore both should not be convicted unless it is proved that they acted in concert.

TOUSSAINT *v.* ALIMAKANDU, Police Court, Batticaloa, 10,379 305

29. ———— *Procedure— Motion to take plaint off the file—Action raised by attorney of plaintiff—Power of attorney not duly stamped at time of filing action—Defect cured on the day such motion was made—*Bonâ fides *of agent—Stamp Ordinance No. 3 of 1890, s. 31—Civil Procedure Code, s. 25—Action on promissory note—Right to demand particulars of admitted payments.*

Where defendant moved that plaint be taken off the file, as the agent who brought the action in the name of his principal did not appear to be authorized by a properly stamped power of attorney, and on the day of the discussion of the motion the defect was cured—

Held, that it was wrong to order the plaint to be taken off the file and restored again to it as from the date on which the

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defect was cured, inasmuch as the Ordinance No. 3 of 1890, section 31, rendered such powers valid as from the date of its execution, and the agent seemed to act *boná fide*. PAGE

In an action on a promissory note it is not usual to deliver particulars of payments admitted by plaintiff, where the note does not appear *ex facie* to be barred.

VELAPPA CHETTY *v.* MEYDIN, District Court, Chilaw, 1,258 333

30. ——— *Writ of execution against property—Commitment of judgment-debtor—Civil Procedure Code, ss. 224, 337, 347—Fatal irregularities.*

Where plaintiff petitioned in terms of section 347 of the Civil Procedure Code, after several years have elapsed between the date of the decree in his favour and the application for its execution, but suppressed the facts that he had made previous applications for execution of the decree and levies had been made on his writ, and, nevertheless, his application was allowed—

Held that, in the absence of any evidence to satisfy the Court, as provided in section 337 of the Code, that in the last preceding application due diligence had been used to procure complete satisfaction of the decree, or that execution was stayed at the request of the judgment-debtor, leave to execute the decree should not have been granted.

Writ against property having issued, and the Fiscal having made return thereto that the judgment-debtors neither complied with his requirement to pay nor pointed out property for seizure, plaintiff moved for and obtained a warrant for the arrest of the judgment-debtor, and had him arrested and committed to prison.

Held that, as the order allowing writ against property had *improvide emanavit*, the writ and the return thereto was unsound, as also the warrant of arrest and the commitment of the defendant to prison.

De Silva v. Sella Umma, 2 S. C. R. 155, explained.

MEERA SAIBO *v.* SAMARANAYAKA, District Court, Kandy, 94,630 342

31. ——— *Appeal—Costs in claim inquiry—Civil Procedure Code, s. 241—Revision.*

When in an investigation, under section 241 of the Civil Procedure Code, into a claim in execution the Court awards costs to the successful party, the order as to costs is not an appealable one.

Semble, per Curiam.—Where, in the case of a claim to land seized in execution, the execution-creditor had not pointed out the land for seizure, or taken any steps in the matter, before the seizure or after it, which might be held to be a ratification of the act of the Fiscal, and had taken no part in the proceedings at the inquiry, he ought not, if the claim is upheld, to be condemned in the claimant's costs.

RAMALINGAM *v.* RAGUNATHA KURUKKAL (SAMBANTAR, Claimant), District Court, Jaffna, 24,021 .. 355

32. ——— *Civil Procedure Code, ss. 337–349, 219, 298—Second application for writ—Due diligence.*

When a judgment-creditor issues writ against the property of the judgment-debtor, and the Fiscal reports that the judgment-debtor is not possessed of any property, it is the duty of the judgment-creditor to apply under section 219 of the Civil Procedure Code to have the debtor examined as

to what property he is possessed of and what debts are due to him, or to have the debtor's person arrested under section 298 of the Code. If a judgment-creditor does not avail himself of either of these provisions, he cannot be said to have used due diligence to secure complete satisfaction of the decree, as contemplated by section 337 of the Code, and is not entitled to make a second application for execution of the decree. PAGE

PALANIAPPA CHETTY *v.* GOMES, District Court, Colombo, 3,430 356

33. ———— *Contract by minor—His liability on promissory note—Interest, how to be decreed—Civil Procedure Code, s. 129—Evidence of certificate of birth—Ordinance No. 18 of 1867, s. 27.*

Under the Roman-Dutch Law the *filius familias* could not bind himself without the consent of his father, except with regard to certain kinds of property. If he contracted, his contracts would not bind him, although, if they were beneficial to the minor, the other party would be bound (*Cens. For. lib. 1, chapter IX., section 5*).

A contract entered into with the authority of his father would bind the unemancipated minor, subject, however, to his right in certain cases, if the contract was a deterimental one, to apply to the Court for the remedy of *restitutio in integrum*.

This remedy, however, is not available in cases where a minor practising a trade or profession incurred liabilities in the course thereof.

Semble, per Bonser, C.J.—Trading is not of itself sufficient to emancipate a *filius familias* so long as he lived under the father's roof. Where a minor and his father, trading together, had granted a joint and several note stipulating for interest at the rate of 15 per cent.—

Held (1) that the plea of minority is not open to the minor, as the note must be presumed to have been made with the consent of the father; and (2) that the proper method of ordering interest in the decree is that the interest should be calculated down to the date of the commencement of the action, and from thence to the date of the decree at the rate of 15 per cent., and a decree given for the aggregate amount made up of the principal and these two sums for interest, and from the date of the decree the interest should be given on the aggregate amount at the rate of 9 per cent.

Semble, per Bonser, C.J.—A certificate of birth given under Ordinance No. 18 of 1867 is *primâ facie* evidence, not only of the birth, but also of the date of birth.

Letchiman Chetty v. Perera (4 S. C. C. 80) queried.

MUTTIAH CHETTY *v.* DE SILVA *et al.*, District Court, Galle, 2,721 358

34. ———— *Civil Procedure Code, ss. 300, 303, 305, 307 to 312—Release of judgment-debtor on terms—Alteration of terms of decree—Payment by instalments—Policy of the law as to incarceration of debtors.*

Under section 300 of the Civil Procedure Code, when a judgment-debtor is brought before the Court after being arrested in execution of a decree for money, the Court, in certain circumstances, may, upon such terms, if any, as it thinks fit, make an order directing his release—

Held, that under this section the Court has no power to alter, to the creditor's disadvantage, the terms of the decree,

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and it cannot therefore allow the debtor the privilege of paying the amount of the decree by instalments. The terms intended by the section must be terms onerous to the debtor and not to the creditor. PAGE

Per Lawrie, J.—The policy of the law now is to discourage the incarceration of honest debtors who, from misfortune and poverty, cannot pay their debts, and to confine the creditor's remedy of imprisoning his debtor only, or at least mainly, to cases where the debtor is contumacious, and will not pay or disclose for seizure funds over which he has control.

SUPERMARIAN *v.* PERUMAL, District Court, Colombo, C/3,753 371

See "COURT"; DIVORCE; FOREST ORDINANCE, 2; *Res Indicata.*

Civil Procedure Code—

Chapter XVII. : *See* CIVIL PROCEDURE, 9.
Chapter XL. : *See* CIVIL PROCEDURE, 16.
Chapter XLVII. : *See* CIVIL PROCEDURE, 4.
Chapter LIII. : *See* CIVIL PROCEDURE, 7.
Section 16 : *See* CIVIL PROCEDURE, 25.
Section 18 : *See* CIVIL PROCEDURE, 10.
Section 24 : *See* CIVIL PROCEDURE, 26.
Section 25 : *See* CIVIL PROCEDURE, 29.
Section 34 : *See* JOINT LESSORS.
Section 74 : *See* CIVIL PROCEDURE, 17.
Sections 86 and 87 : *See* CIVIL PROCEDURE, 11.
Section 129 : *See* CIVIL PROCEDURE, 33.
Section 191 : *See* CIVIL PROCEDURE, 13 and 14.
Section 214 : *See* CIVIL PROCEDURE, 15.
Section 219 : *See* CIVIL PROCEDURE, 9, 28, and 32.
Section 224 : *See* CIVIL PROCEDURE, 30.
Section 226 : *See* CIVIL PROCEDURE, 27.
Section 241 : *See* CIVIL PROCEDURE, 15 and 31.
Section 247 : *See* CIVIL PROCEDURE, 3 and 19.
Sections 283 and 286 : *See* CIVIL PROCEDURE, 2.
Section 289 : *See* TITLE TO IMMOVABLE PROPERTY.
Section 298 : *See* " COURT " ; CIVIL PROCEDURE, 32.
Sections 300, 303, and 305 : *See* CIVIL PROCEDURE, 34.
Sections 307 to 312 : *See* CIVIL PROCEDURE, 34.
Section 320 : *See* CIVIL PROCEDURE, 13 and 14.
Section 321 : *See* CIVIL PROCEDURE, 13.
Section 322 : *See* CIVIL PROCEDURE, 14.
Section 337 : *See* CIVIL PROCEDURE, 30 and 32.
Sections 338 to 346 : *See* CIVIL PROCEDURE, 32.
Section 347 : *See* CIVIL PROCEDURE, 30 and 32.
Sections 348 and 349 : *See* CIVIL PROCEDURE, 32.
Section 438 : *See* CIVIL PROCEDURE, 21.
Section 481 : *See* CIVIL POOCEDURE, 1.
Section 526 : CIVIL PROCEDURE, 22.
Section 535 : *See* CIVIL PROCEDURE, 22.
Section 542 : *See* CIVIL PROCEDURE, 8.
Section 543 : *See* CIVIL PROCEDURE, 8 and 28.
Section 582 : *See* CIVIL PROCEDURE, 1.
Section 597 : *See* DIVORCE.
Section 642 : *See* CIVIL PROCEDURE, 23 ; RES JUDICATA.
Section 753 : *See* CIVIL PROCEDURE, 27.
Section 756 : *See* FOREST ORDINANCE, 2 ; CIVIL PROCEDURE, 18.
Section 781 : *See* CIVIL PROCEDURE, 24.

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Claim (personal)— PAGE
By representative of mortgagor to property mortgaged : *See* RES JUDICATA.

Claim in execution—
See CIVIL PROCEDURE, 12.
Class of costs : *See* CIVIL PROCEDURE, 15.

Class of suit—
Reduced, stamp duty for : *See* STAMP DUTY.

Colonial courts—
Duty of, to follow decisions of Courts of Appeal in England : *See* CIVIL PROCEDURE, 10.

Collision at sea—
See SHIPPING, 1.

Commitment of judgment-debtor –
See CIVIL PROCEDURE, 30.

Compensation—
See CRIMINAL PROCEDURE, 15.

Complaints to Police Magistrates—
Exercise of wise discretion in entertaining : *See* CRIMINAL PROCEDURE, 11.

Confession, admissibility of—
See EVIDENCE, 3.

Confirmation of sale—
See CIVIL PROCEDURE, 2.

Consent—
Of parties to irregular reception of evidence in criminal cases : *See* CRIMINAL PROCEDURE, 4.

Consideration—
Illegal on promissory note : *See* PROMISSORY NOTE.
Want of, for deed : *See* FRAUDULENT DEED.

Contempt of Court—
1. ——— *Contempt of Court—Disobedience of order of Court—Admission made in a former proceeding—Conviction upon such admission—Alterations in the record.*

In order to find a person guilty of contempt for disobeying an order of Court, it is necessary that such order should have been duly drawn up by the Court.

An accused, who had admitted the truth of the charges brought against him, having been once discharged on his undertaking to do certain things, it is not competent for a Magistrate, upon finding that the accused had failed to fulfil his undertaking, to convict him upon his previous admission.

If a Magistrate make any alteration or addition in any proceeding, he should note in the margin the date of such alteration or addition and initial it.

SINNATANGAM *v.* SINNEN, Police Court, Jaffna, 15,535.. 220

2. ——— *Contempt of Court—Neglect to comply with order drawn up informally and made* ultra vires.

In an action for the recovery of certain jewellery, it being found, after the evidence of both parties had been heard, that the plaintiff owed a certain sum of money to the defendant, who was in possession of the jewellery, the District

Judge, without entering a decree in favour of either party, recorded his opinion that "the most equitable course is to "order the plaintiff to bring into Court the sum of Rs. 91 "within fourteen days, and the defendant to bring into "Court jewellery also within fourteen days, to abide the "further order and decree of this Court." No formal order was drawn up. PAGE

Held, that this order was irregular and *ultra vires*, and that a disobedience of it by defendant did not justify his conviction as for a contempt of court.

PIERIS *v.* FERNANDO, District Court, Colombo, 6,580.. 306

3. ———— *See* CIVIL PROCEDURE, 9.
4. ———— *See* JURISDICTION, 1.

Contract of service—
See MASTER AND SERVANT, 3.

Contract on misrepresentation—
See PRINCIPAL AND AGENT.

Conveyance, Fiscal's—
See TITLE TO IMMOVABLE PROPERTY.
When to be executed: *See* CIVIL PROCEDURE, 2.

Conveyance of land—
Conveyance of land—Validity of it, for want of description by metes and bounds—Evidence.

A conveyance is not invalid for want of description of land by metes and bounds. Its identification and limits are provable by parol evidence.

BABASURIYA *v.* CHARLES, District Court, Mátara, 792 348

Conviction in the alternative—
See CRIMINAL PROCEDURE, 10.

Coolies—
Loans to kankanies for procuring:
Ordinances No. 11 of 1865, s. 11, and No. 13 of 1869, ss. 6 and 7—Loans to kankani for procuring coolies—Agreement to repay such loans by wages earned—Effect of such agreement on the criminal liability of the kankani under the Labour Ordinances—Meaning of "advances."

Loans made to an estate kankani for procuring coolies cannot be debited to him in the settlement of wages due to him, as such loans are not "advances" in the sense of the term explained in section 12 of the Ordinance No. 13 of 1889.

Even if there was an agreement between the labourer and his employer that such loans should be set off against wages due, it cannot have the effect of making him criminally liable under the Ordinance if, at the time of quitting service, the monthly wages earned by him shall not have been paid in full within sixty days from the expiration of the month during which such wages have been earned.

SINCLAIR *v.* RAMASAMI KANKANI, Police Court, Hatton, 16,987 43

Cooly—
See MASTER AND SERVANT, 1.

Costs—
Of claim inquiry, when not payable by execution-creditor: *See* CIVIL PROCEDURE, 27 and 31. ..
Security for, in appeal in insolvency proceedings: See CIVIL PROCEDURE, 18.
Taxation of: *See* CIVIL PROCEDURE, 15.

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"Court"— PAGE

Warrant of arrest—"Court," meaning of, as used in s. 298, Civil Procedure Code—Committal and discharge of judgment-debtor—Order made in his absence, and not in Court—"Chambers," what it includes—Power of District Judge to re-issue warrant of arrest or issue fresh warrant.

Under section 298 of the Civil Procedure Code a judgment-debtor when arrested on a warrant of arrest should be brought before the Court—

Held, by Bonser, C.J., and Withers, J., that the word "court" there meant the place where the Judge was empowered to act judicially, and was in fact so acting.

Held further, that a District Judge had no power to order the committal or release of a judgment-debtor arrested on a warrant when he had not the debtor before him.

Per Bonser, C.J.—A District Judge cannot ordinarily exercise his judicial functions elsewhere than in open court.

Per Lawrie, J.—(1) An order of commitment or release of a civil prisoner is a judicial act which can competently be done in "chambers," and "chambers" includes the Judge's own house, if it is situated in the town where his Court is.

(2) Where a Judge finds that he was in error in discharging a judgment-debtor arrested on a warrant of arrest, and that the creditor had used due diligence in the conduct of the warrant, he may issue a fresh warrant or re-issue the old one.

MOHIDEEN *v.* NALLATAMBY, District Court, Kandy, 9,256 377

Credit to persons of slender means—

Practice of allowing : *See* INSOLVENCY.

Criminal procedure—

1. ——— *Forest Ordinance, No. 10 of 1885, chapter IV.—Prosecution under rules of 3rd February, 1887—Proof in such cases—Validity of judgment—Criminal Procedure Code, s. 372.*

In a prosecution for clearing (for chena cultivation) a land at the disposal of the Crown without a permit, in breach of a rule framed under chapter IV. of the Ordinance No. 10 of 1885, it is necessary to prove that the land is not one within a reserved or village forest; that it is at the disposal of the Crown; that it is a chena; that its extent and boundaries are so and so; and that the accused cleared it.

A judgment of a criminal court should specify the offence with which the accused is charged, in terms of section 372 of the Criminal Procedure Code.

ALAWATUGODA RATEMAHATMAYA *v.* KIRIWANTE, Police Court, Nuwara Eliya, 8,926 73

2. ——— *Right to appeal for enhancement of punishment—Criminal Procedure Code, s. 406—Error of law or of fact—Error in point of opinion—Right of party injured or other private complainant to appeal in a case where the parties are the Crown and the accused—Application for revision of proceedings under s. 426—Necessity for notice of revision.*

An appeal for enhancement of punishment is permissible on the ground of error of fact or of law, in cases where both imprisonment and fine have been imposed, and in the cases not excepted in sections 403, 404, and 405 of the Criminal Procedure Code.

Error in point of opinion on the part of a Judge as to the degree of injury to a complainant, or the degree of criminality of an accused, or as to the nature or amount of punishment inflicted, does not amount to an error in law.

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Insufficiency of punishment could only be an error in law when a minimum amount of penalty had been prescribed but had not been imposed. PAGE

In a criminal prosecution by the Crown, the party injured or other private complainant has not the right of appeal provided for in section 406 of the Criminal Procedure Code.

An application for revision under section 426 will not be entertained without due notice to the respondent.

QUEEN v. DANIEL, District Court, Kégalla, 836 .. 87

3. ——— *Criminal Procedue Code, chapters XVI. and XIX.—Change of proceeding from inquiry into rial—Criminal Procedure Code, s. 226 (Ordinance No. 22 of 1890, s. 7)—Right of Police Magistrate to convict upon evidence taken in a case which he has no power to try.*

In proceedings taken under chapter XVI. of the Criminal Procedure Code a Police Magistrate has to take and record evidence for the prosecution with the view of ascertaining whether there is such a *prima facie* case made out against the accused as could justify him in committing the accused for trial to a Superior Court, and not to determine his guilt or innocence, which is in issue only in trials under chapter XIX.

Where, in the course of proceedings initiated under chapter XVI., a Magistrate finds that the facts proved amount to an offence triable by him summarily under chapter XIX., the proper course is to stay proceedings on the inquiry, frame a fresh charge, and try the case, giving the accused notice that he is on his trial, and affording him sufficient time to prepare his defence.

Section 226 of the Code (as amended by Ordinance No. 22 of 1890) refers to cases where a Police Magistrate is trying a case over which he has jurisdiction, and not to cases where he is not acting as Judge, but as an inquirer. Its import is that, when a Judge is trying a case and finds that the charge laid was not correctly framed according to the facts which appear in evidence before him, but that some other offence over which he has jurisdiction is proved, he may convict of that offence.

Facts which appear in the depositions of witnesses taken, not for the purpose of a trial, but for the purpose of an inquiry cannot be said to be proved for the purpose of a conviction.

SARAM v. WEERA, Police Court, Colombo, 37,639 .. 95

4. ——— *Trial of criminal case—Irregular reception of evidence—Consent of parties.*

In a criminal case it is irregular to import into it and consider as evidence the evidence taken and recorded in another case, though the complainants therein were the accused in the former case.

Consent thereto, on the part of the parties to the counter-cases, will not avail to render irregular proceedings regular.

QUEEN v. SUSE TISSERA, District Court, Chilaw, 2,459.. 108

5. ——— *Criminal Procedure Code, s. 226, s. 16 of Ordinance No. 1 of 1888, and s. 352 of the Procedure Code—Irregularity of deciding case upon evidence outside it.*

The necessity for the framing of a charge by a Magistrate under section 226 of the Criminal Procedure Code does not exist in the case of a simple complaint, more or less in the words of a formal charge read and explained to an accused at the commencement of the trial and adopted by the Magistrate as his charge.

Failure to give an accused an opportunity to make a statement and to question him generally as to his defence, as

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required by section 352 of the Criminal Procedure Code and section 16 of Ordinance No. 1 of 1888, amounts to a fatal irregularity only if he were an ignorant and illiterate person and destitute of legal assistance at the trial. PAGE

Each case must be decided solely upon evidence recorded therein, without reference to any other case.

Tissera v. Foster (*9 S. C. C. 173*) distinguished.

VENASY *v.* VELAN, Police Court, Mallakam, 8,091 .. 124

6. ———— *Penal Code, s. 199—Intentional omission to give information of offence—Criminal Procedure Code. s. 24—Duty of police officer—Mistake—Punishment.*

Where a headman, who had received information that A had committed rape on B, omitted to inform the nearest Police Magistrate of the same, and it appeared that such omission was due to the belief that as the parties were willing to settle the matter by marriage so as to avoid the disgrace of a public exposure, he was not bound to communicate the information,—

Held, the offence of the headman was, in the circumstances, committed under a mistake as to his duty, and that his punishment should be therefore nominal.

BALTHAZAR *v.* GUNAWARDANA, Police Court, Galle, 17,318 158

7. ———— *Appeal—Computation of time—Criminal Procedure Code, s. 406.*

In calculating a period within which an act is required to be done, the day from or after which such period is to be commenced is excluded, and the last day of such period included.

WICKRAMASOORIYA *v.* APPUSINHO, Police Court, Balapitiya, 14,269 178

8. ———— *Appeal where accused had pleaded guilty—Plea of guilty—Criminal Procedure Code, ss. 220, 229, and 403—Judgment—Criminal Procedure Code, s. 372.*

Where an accused appeared to summons, and the Police Magistrate explained to him the particulars of the offence, and then recorded as follows:—"He pleads guilty. I "accept the admission of the accused. He is fined Rs. 5."—

Held, that this was irregular, the proper course under section 220 of the Criminal Procedure Code being to record the admission of an accused party, as nearly as possible, in the words used by him.

In the event of a conviction in the Police Court the requirements of section 372 of the Criminal Procedure Code, as to specifying the offence of which, and the section of the law under which, the accused is convicted, must be conformed to.

DAWSON *v.* PERERA, Additional Police Court, Colombo, 3,866 194

9. ———— *Criminal Procedure Code, s. 207—Misjoinder of accused—Unlawful gaming—Keeping a common gaming-house—Evidence—Ordinance No. 17 of 1889.*

It is a misjoinder to try a person charged with the offence of keeping a common gaming-house along with one charged with unlawful gaming.

The essence of the offence of unlawful gaming under Ordinance No. 17 of 1889 is the publicity which attracts idlers of all sorts to various forms of public nuisance. It is therefore incumbent on the prosecution, on a charge of unlawful gaming, to prove that the house in which the gaming was carried on was a common gaming-place.

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If a man choose to allow the public access to his house, with or without payment, to play with cards for money, he uses it as a common gaming-house. But any number of a man's friends or acquaintances may play in his house every day with cards for money without an offence being committed against the Ordinance. PAGE

JAYAWARDANA *v.* DON THOMAS, Police Court, Tangalla, 9,456 216

10. ——— *Irregularity in recording evidence—Ordinance No. 22 of 1890, s. 12—Criminal Procedure Code, s. 472—Conviction in the alternative—Warrant issued in the Sinhalese language.*

Evidence recorded in a proceeding against A, which disclosed an offence on the part of B, who was not present, cannot be made use of against B on a subsequent day when arrested and brought up by reading over to the witnesses in the presence of B the evidence already recorded, and examining them further and allowing B an opportunity to cross-examine the witnesses on the whole evidence. The proper course is to record their evidence afresh.

The Penal Code does not provide for a conviction in the alternative, and therefore a conviction for "dishonestly receiving or retaining stolen property" is irregular.

Per Bonser, C.J.—There is no authority in our law for the issue of process in a foreign language. The language of the Ceylon Courts being the English language, serious doubts might arise as to the legality of an arrest upon a warrant issued in such form.

CORNELIS *v.* ULUWITIKE, Police Court, Galle, 16,679 .. 248

11. ——— *Criminal Procedure Code, ss. 229 and 403—Ordinance No. 22 of 1890, repealing chapter XIX. of Criminal Procedure Code—Right of appeal where accused has pleaded guilty—Mode of recording admission of offence by accused—Criminal Procedure Code, s. 220—"Additional Police Court"—Status and powers of Magistrate of one Court sitting apart from each other—Ordinance No. 1 of 1889, ss. 55, 56, 57—Exercise of wise discretion in entertaining complaints.*

Since the repeal of section 229 of the Criminal Procedure Code, section 403 has become inapplicable to the procedure provided by section 220 of the amending Ordinance No. 22 of 1890, and now there is no statutory bar to an appeal by an accused person who has been convicted in a Police Court summarily upon his own admission of guilt.

The terms of section 220, as regards the mode of recording the admission of the accused, must be strictly complied with. It is not enough to record that "he pleaded guilty to the charge," but the exact words used by him should be set forth.

Ordinance No. 1 of 1889, sections 55, 56, and 57, does not admit of any such Court as "the Additional Police Court of ———," as if each of the several Magistrates whom the Governor may appoint to a Court constituted a distinct and independent Court.

The proceedings before each such Magistrate should be intituled "In the Police Court of ——— (naming the division), holden at ———, before ———, one of the Magistrates of the said Court."

There is no objection to one Magistrate of a Court entertaining a complaint and issuing process to compel the attendance of an accused person before a Police Court, and the inquiry or trial being undertaken by another Magistrate of

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the same Court; nor is it objectionable for one Magistrate to admit to bail a person who has been dealt with by another Magistrate of the same Court, or to perform a purely ministerial act like the communicating to an accused the order of the Supreme Court in appeal, and to give effect to such order. PAGE

But where one Magistrate has commenced to hear a case, he must continue it to the end, unless it falls within section 89 of the Ordinance No. 1 of 1889.

Observations on the exercise of wise discretion in entertaining plaints.

JANSEN *v.* ARNOLIS, Police Court, Colombo, 4,042 (Itinerating Police Magistrate, Western Province) .. 274

12. ——— *Criminal Procedure—Questions and answers under s. 16 of Ordinance No. 1 of 1888—Criminal Procedure Code, s. 473.*

Questions put to an accused by a Police Magistrate at a non-summary inquiry, and answers elicited from him under section 16 of Ordinance No. 1 of 1888, cannot, without proper proof, be read in evidence at the trial. If it is sought to put such questions and answers in evidence, they must be proved by some person who was present at the inquiry and heard them.

The irregular reception of such questions and answers in evidence is fatal to a conviction, it being impossible to say what effect this improperly recorded evidence may have had on the Judge's mind.

The object of the provision in section 16 of Ordinance No. 1 of 1888 is to call the attention of the accused to various points which have been proved against him, so that he may have an opportunity of explaining them, and that they may not remain unexplained in consequence of forgetfulness on the part of the accused, or ignorance of their bearing and effect.

THE QUEEN *v.* ANISU LEBBE, District Court, Batticaloa, (Criminal), 2,056 279

3. ——— *Criminal Procedure Code, ss. 175, 238, and 242—Power of Police Magistrate to try a lower offence, while a charge for a higher offence beyond his jurisdiction remained formally undisposed of—Power of "Attorney-General" under ss. 241–243.*

Complaint was made against accused for intentional insult under section 484 of the Penal Code and criminal intimidation under section 486. The Magistrate heard evidence, formulated charges under both these sections, and forwarded proceedings to the Solicitor-General under section 175 of the Criminal Procedure Code. On the return of the record to the Police Magistrate he proceeded to try the accused summarily for the offence under section 484 only, and convicted him of it. At this trial the complainant and his witnesses confined themselves to that part of their story which applied to this offence and omitted the rest of it:

Held, that such procedure was irregular.

The intention of section 238 of the Criminal Procedure Code, as amended by Ordinance No. 22 of 1890, is to prevent the Magistrate being satisfied that the evidence disclosed an offence which he had no jurisdiction to try, and having framed a charge for the graver offence was not at liberty to dispose of the minor offence.

Observations of the Chief Justice on the impropriety of getting witnesses to say only what will square with the particular charge which the Court has determined to try.

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Under sections 241, 242, and 243 the "Attorney-General" may follow one of these courses: (1) If he is satisfied that the proceedings are in order, he may nominate the Court of trial. (2) If the thinks that no further proceedings should be taken, he may direct the discharge of the accused. (3) If he finds the evidence defective, he may require the Magistrate to take further evidence. PAGE

WIKRAMASOORIYA *v.* APPUSINHO, Police Court, Balapitiya, 14,269 298

14. ——— *Criminal Procedure Code, s. 18—Sentence—Power of Court to give aggregate punishment—Distinct offences.*

Under section 18 of the Criminal Procedure Code it is competent for a District Court to pass sentences on an accused person aggregating four years.

But such a power should not be exercised except when the offences of which the accused is convicted are completely distinct in their character.

QUEEN *v.* CARA, District Court, Kalutara (Criminal), 650 320

15. ———*Criminal Procedure Code, s. 236—False and vexatious case—Case "instituted on complaint"—Case instituted on formal police report—Duty of police officers as to complaints made to them— Compensation—Crown costs.*

Where a Police Magistrate takes proceedings on a formal written report made to him by a police officer under subsection 2 of section 152 of the Criminal Procedure Code, and finds the complaint frivolous or vexatious, it is not open to him to condemn the party on whose information such written report was made either in compensation to the accused or in Crown costs.

A case "instituted on complaint" (referred to in section 236 of the Criminal Procedure Code) is a case instituted on a complaint made by a person to a Police Magistrate in terms of section 152 (1) of that Code, and does not mean a case instituted on a "formal written report" made by a police officer to the Magistrate in terms of section 152 (2).

The reason why the order to pay compensation to the accused is restricted to cases "instituted on complaint" is because the Legislature thought that the police would not institute cases without having previously made due inquiry and satisfied themselves that there was a real, substantial case which ought to be dealt with by a Police Court. If the result of the inquiry made by the police is to leave room for doubt whether the case is not a frivolous one, they should refer the informant to the Police Court, and not take upon themselves the responsibility of instituting a case of the *bona fides* and merits of which they are not satisfied.

KUTTALAM CHETTY *v.* INA MUTTU, Police Court, Colombo, 41,035 326

16. ——— *Ordinance No. 22 of 1890, s. 228—Discharge of accused upon absence of complainant—Illegality of subsequent trial and conviction.*

In a case triable summarily, after once discharging the accused owing to the absence of the complainant, it is not competent for the Police Magistrate, under section 228 of Ordinance No. 22 of 1890, to re-summon him, and after evidence heard to convict him.

The original discharge should be treated as an acquittal, and once acquitted he could not be tried again.

UKKURALA *v.* DAVID SINHO, Police Court, Chilaw, 8,973 332

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17. ——— *Appealable order—Criminal Procedure Code, ss. 414, 426—Order made by Police Court under Ordinance No. 6 of 1891—Appeal to enhance punishment—Power of Supreme Court to enhance in appeal sentence passed.* PAGE

Per Withers, J.—No appeal lies from an order of the Police Court to have a greater punishment inflicted than the Magistrate has passed. And the Supreme Court has no power in appeal to enhance such punishment.

SAXTON *v.* ANDI, Police Court, Mátalé, 9,860 .. 341

Criminal Procedure Code—

Chapter XVI. : *See* CRIMINAL PROCEDURE, 3.
Chapter XIX. : *See* CRIMINAL PROCEDURE, 3 and 11.
Section 18 : *See* CRIMINAL PROCEDURE, 14.
Section 24 : *See* CRIMINAL PROCEDURE, 6.
Section 175 : *See* CRIMINAL PROCEDURE, 13.
Section 207 : *See* CRIMINAL PROCEDURE, 9.
Section 220 : *See* CRIMINAL PROCEDURE, 8 and 11.
Section 226 : *See* CRIMINAL PROCEDURE, 3 and 5.
Section 228 : *See* CRIMINAL PROCEDURE, 16.
Section 229 : *See* CRIMINAL PROCEDURE, 8 and 11.
Section 236 : *See* CRIMINAL PROCEDURE, 15.
Section 238 : *See* CRIMINAL PROCEDURE, 13.
Section 241 : *See* CRIMINAL PROCEDURE, 13.
Section 242 : *See* CRIMINAL PROCEDURE, 13.
Section 243 : *See* CRIMINAL PROCEDURE, 13.
Section 352 : *See* CRIMINAL PROCEDURE, 5.
Section 372 : *See* CRIMINAL PROCEDURE, 1 and 8.
Section 403 : *See* CRIMINAL PROCEDURE, 8 and 11.
Section 406 : *See* CRIMINAL PROCEDURE, 2 and 7.
Section 414 : *See* CRIMINAL PROCEDURE, 17.
Section 426 : *See* CRIMINAL PROCEDURE, 2 and 17.
Section 466 : *See* EVIDENCE, 1.
Section 472 : *See* CRIMINAL PROCEDURE, 10.
Section 473 : *See* CRIMINAL PROCEDURE, 12.

Criminal trespass—

See GAMING, 1.

Crown costs—

See CRIMINAL PROCEDURE, 15.

Crown—

Right of, to license use of foreshore : *See* FORESHORE.

Curatorship—

See CIVIL PROCEDURE, 1.
Application for : *See* GUARDIANSHIP.

Damage by dogs—

Liability of owner for : *See* BRUTE ANIMAL.

Damages—

See SHIPPING, 1.
Liability of agent for : *See* PRINCIPAL AND AGENT.
Special, in cases of slander : *See* SLANDER.

Death of intestate—

Omission to report : *See* CIVIL PROCEDURE, 28.

Death—

Prosecution for not reporting : *See* CIVIL PROCEDURE, 8.

Decree—

Absolute for default : *See* CIVIL PROCEDURE, 11.
Alteration of terms of : *See* CIVIL PROCEDURE, 34.

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Alternative, for goods or their value: *See* Civil Procedure, 13. PAGE
Form of: *See* Civil Procedure, 14.
In action for specific performance: *See* Specific Performance.

Defamation—

Defamation—Words per se *contumelious—Presumption of evil intent—Rebutting evidence as to absence of* animus et affectus injurandi.

Defendant having presented a petition to the Secretary of the Municipal Council of Kandy, containing the statement that certain persons, "including the plaintiff, are selling "opium and bhang secretly with the intention of making "money fraudulently against the Government"—

Held, that the above words were *per se* contumelious, and their publication should be presumed to have been made with a contumacious intent, in the absence of proof that the defendant wrote the words complained of *sine injuriandi animo et affectu.*

Silva *v.* Ramen Chetty, District Court, Kandy (Crim.), 8,343. 225

Description by metes and bounds—
Absence of, in conveyance of land: *See* Conveyance of Land.

Detinue—
Action for: *See* Civil Procedure, 13 and 14.

Discharge of accused owing to absence of complainant—
See Criminal Procedure, 16.

Discretion of person authorized to grant permit for removal of arrack—
See Arrack.

District Courts—
Power of, to grant relief in cases of disputes to property attached to religious office: *See* Jurisdiction, 2.
Power of, to punish for contempt: *See* Jurisdiction, 1.

District Judge—
Power of, to re-issue warrant of arrest or issue fresh warrant: *See* "Court."

Divorce—

Marriage between British or European spouses resident in the Island—Matrimonial law of Ceylon—Proclamation of 23rd September, 1799—Charters of 1801 and 1833—Scope of s. 597 of Civil Procedure Code—Applicability of Roman-Dutch Law—Authority of International Law in the consideration of jurisdiction of Courts—Remedies for matrimonial misconduct allowable by Courts of the residence of the spouses—Action for divorce—for judicial separation—for alimony.

The matrimonial law of Ceylon, established by the Proclamation of 23rd September, 1799, was superseded, or at least modified, in so far as it related to British and European residents, by the enactments of the Royal Charter of 1801. But upon the repeal of those enactments by the Charter of Justice of the 18th February, 1833, the Proclamation of 1799, was revived, and the matrimonial law applicable to such residents again became the Roman-Dutch Law.

The Roman-Dutch law does not give jurisdiction to the Courts of the country in which spouses domiciled elsewhere are for the time resident to entertain a divorce suit.

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Neither does section 597 of the Civil Procedure Code, nor did previous enactments to a similar effect, empower a District Court to entertain any divorce suit which was not previously cognizable by the Courts of the Island. PAGE

According to International law, which is authoritative in the absence of any municipal law to the contrary, the true domicile of the married pair, as distinguished from their so-called matrimonial domicile, affords the only test of jurisdiction to dissolve their marriage; and the Courts of England will not recognize as effectual the decree of a foreign court divorcing spouses who at its date had their domicile in England.

But though a District Court of the Island cannot decree a dissolution of marriage in the case of such residents, yet it may, under the rules of International law, administer other remedies for matrimonial misconduct, such as judicial separation on the ground of cruelty, and alimony for desertion.

LE MESURIER *v.* LE MESURIER *et al.*, District Court, Mátara, 502 160

Drums—
Beating of, at night without license: *See* PUBLIC NUISANCE.

Due diligence necessary in applications for writ—
See CIVIL PROCEDURE, 32.

Dying declaration—
See EVIDENCE, 1.

Election of accused to be tried by District Court—
See MERCHANDISE MARKS ACT.

Enhancement of punishment, appeal for—
See CRIMINAL PROCEDURE, 17.

Error—
See CRIMINAL PROCEDURE, 2.

Estate under Rs. 1,000—
See CIVIL PROCEDURE, 23.

Evidence—

1. ——— *Evidence—Dying declaration of person whose death was not the subject of inquiry at the trial—Its admissibility under s. 466 of the Criminal Procedure Code and under the common law.*

A statement made by a dying man before an Inquirer into Deaths is not receivable in evidence under section 466 of the Criminal Procedure Code, not having been made on oath or affirmation, nor taken down by a Police Magistrate.

Per Bonser, C.J.—The declaration of a dying person whose death did not form the subject of inquiry at the trial is not admissible without proof that the declarant was in actual danger of death and had given up all hope of recovery, and that the deaths of the declarant and the person whose death was being investigated were all due to one and the same transaction.

REGINA *v.* CHARLES DIAS, Mátara Criminal Sessions, No. 2 75

2. ——— *Evidence—Forgery—Comparison of handwriting in disputed document with handwriting in genuine document.*

In a case of forgery, a Judge sitting without a jury should not arrive at a decision on the comparison of handwritings without some proof that the handwriting of the disputed document is the handwriting of the accused.

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Bonser, C.J.—I am not satisfied that it was intended to allow a jury to find a man guilty of forgery, when no qualified witness could be found willing to state his belief that the alleged forgery was in the handwriting of the accused. PAGE

Withers, J. (with much hesitation).—It is permissible for a jury or Judge to bring in a verdict of guilty on the comparison of a disputed handwriting with a well-proved handwriting, unsupported by other evidence as to the disputed handwriting.

But a decision of Judge or jury resting solely on a comparison of other than ancient documents is dangerous.

CAVE *v.* KRELTSZHEIM, Police Court, Colombo, 38,081 146

3. ———— *Evidence—Admissibility of a confession—Burden of proof—Inducement.*

A statement amounting to a confession is inadmissible in evidence against an accused, unless it be proved affirmatively by the prosecution that the statement was not made under the influence of an improper inducement.

The mere fact that the statement was not made in answer to questions does not exclude the possibility of its having been made as the result of a threat or an exhortation to confess.

QUEEN *v.* AMARIS APPU, District Court, Colombo (Criminal), 1,167 209

See LANDLORD AND TENANT; FOREST ORDINANCE, 1; SHIPPING, 2.

As to place being a brothel: *See* BROTHEL.

Deciding case on, outside record: *See* CRIMINAL PROCEDURE, 5.

Irregularity in recording: *See* CRIMINAL PROCEDURE, 10.

Irregular reception of: *See* CRIMINAL PROCEDURE, 4.

Necessity of recording refusal to admit: *See* CIVIL PROCEDURE, 5.

On charge of criminal trespass: *See* GEMMING.

On charge of unlawful gaming: *See* CRIMINAL PROCEDURE, 9.

Parol, to prove metes and bounds of land conveyed: *See* CONVEYANCE OF LAND.

Rebutting, as to *animus injuriandi* in cases of defamation: *See* DEFAMATION.

Rejection of, of witness who has remained in Court: *See* WITNESS.

Summary trial on, taken in non-summary inquiry: *See* CRIMINAL PROCEDURE, 3.

Tender of: *See* CIVIL PROCEDURE, 5.

***Ex parte*—**

Motion: *See* CIVIL PROCEDURE, 4.

Order: *See* CIVIL PROCEDURE, 22.

False evidence—

Intentionally giving false evidence—Trial of offence by the Judge before whom such evidence was given—Propriety of such trial.

Where a witness has intentionally given false evidence in a case before a District Judge, it is not improper on his part to try him for such offence upon a committal duly made. But it would have been more satisfactory if at such trial he had the assistance of assessors.

QUEEN *v.* DE SILVA, District Court, Galle (Criminal), 12,156 296

False weights—

Possession of false weights—Intention to use fraudulently—Testing of balance—Ceylon Penal Code, s. 259—Ordinance No. 11 of 1887.

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PAGE

It is not an offence under section 259 of the Penal Code as amended by Ordinance No. 11 of 1887 to possess a false weight unless such possession be with the intention to use it fraudulently.

And the mere possession of a weight which does not conform to the standard, and even the use of it, is not presumptive evidence of an intention to use it fraudulently.

A balance used for testing a weight which is alleged to be a false one should itself be tested before it is applied as a test.

OSSEN *v.* SIADORIS, Police Court, Hatton, 18,210 .. 323

Family arrangements with reference to *fidei commissa*—
See FIDEI COMMISSUM.

Fatal irregularities—
See CIVIL PROCEDURE, 30.

***Fidei Commissum*—**

*Last will, construction of—"The children of the testatrix and their descendants"—*Fidei commissum—*Tenancy in common—Ordinance No. 21 of 1844, s. 20—Intention of testatrix—Family arrangement.*

Per Bonser, C.J.—No special words are necessary to create a *fidei commissum*, but effect is given to it if it can be collected from any expressions in the instrument that it was the testator's intention to create it.

General rules for the interpretation of wills are often unsafe guides. The only true criterion is the intention of the testator, to be gathered from the will and the circumstances of the case.

Per Browne, A.J.—The expression "my children and their descendants" differs in nowise from "my children and my descendants."

Per Withers, J.—A direction in a last will that the children and their descendantsshould not sell or alienate the property devised is in itself a creation of a *fidei commissum*, and the children appointed heirs for the residue of the estate took such property subject to the *fidei commissum*.

If a thing is to be preserved intact and disintegrated for the benefit of coming generations, then the tenants for the time being, while the seal of the *fidei commissum* is still upon that thing, with possibility of succeeding beneficiaries, must be considered as tenants to whom the rule of *jus accrescendi* is applicable, in order to serve the express purpose for which the *fidei commissum* was created, and the operation of the Ordinance No. 21 of 1844, section 20, will be suspended till either there is no possibility of succession or till the term fixed for *fidei commissum* has expired.

Per Curiam.—Whatever may have been the intention of the testator as to the creation of a *fidei commissum*, where the will has been construed by the parties as if the testator had impressed a *fidei commissum* on the property, and such construction has formed the basis of family arrangements for a long period, it should not be disturbed.

VANSANDEN *v.* MACK, District Court, Colombo, 12,976 311

Final decree in partition suit, effect of—
See PARTITION.

Fiscal's conveyance—
See CIVIL PROCEDURE, 2 ; REGISTRATION.

Fishing nets—
Dragging : *See* MASTER AND SERVANT, 2.

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Footpath— PAGE

See Right of Way.

Foreshore—

Right of Crown to license use of foreshore of the sea—Cometency of Mudaliyár of District use for rent for Crown land.

It is competent for the Crown, by its regularly appointed agents, to grant licenses to fishermen to spread their nets on the seashore or on land belonging to the Crown adjacent to the seashore.

Rent for Crown land cannot be sued for in the name of the Mudaliyár of the District, but in that of the Queen.

Rowel Mudaliyar *v.* Pieris, Court of Requests, Chilaw, 2,299 81

Forest Ordinance—

1. ——— *Forest Ordinance, 1885—Rule made under chapter IV.—Clearing land for chena cultivation—Land at the disposal of the Crown—Evidence.*

On a charge laid under rule 1 of the rules framed under chapter IV. of the Ordinance No. 10 of 1885, that the accused cleared a land at the disposal of the Crown without a permit from the Government Agent, it is necessary to prove that the land was cleared for chena cultivation, that such land was at the disposal of the Crown, and that it was not within a reserved or village forest.

Semble, per Bonser, C.J.—The only intelligible way of interpreting the expression "land at the disposal of the Crown" in the interpretation clause is to read clauses (*b*), (*c*), and (*d*) as cutting down the generality of the definition given in clause (*a*), so that the meaning of that expression would appear to be all forest, waste, unoccupied, or uncultivated land, which has not been expressly granted away by the Crown (clause *b*), or in respect of which the Crown has not waived its right by issuing its certificate of no claim (clause *c*), or which has not been registered a temple land (clause *d*).

Nugapitiya Muhandiram *v.* Sudalayandi, Police Court, Kėgalla, 13,750 102

2. ———*Forest Ordinance, 1885—Amending Ordinance No. 1 of 1892, s. 9, sub-section 6—Appeal from decision of Forest Settlement Officer—Procedure as to lodging appeal and time from supplying stamp or judgment in appeal—Civil Procedure Code, s. 756—Ordinance No. 3 of 1890.*

Per Burnside, C.J., and Withers, J. (*dissentiente* Lawrie, J.).—All that is required of a party appellant under section 9 of the Ordinance No. 1 of 1892 is to lodge with the forest officer, within three weeks of the order appealed from, a duly stamped petition of appeal and affidavit to enable him to have his appeal dealt with by the Supreme Court.

It is not necessary for the appellant to deliver, as provided in the Ordinance No. 3 of 1890, in the case of appeals from District Courts and Courts of Requests, a proper stamp for the decree or order of the Supreme Court.

But counsel for appellant should, before argument, undertake to supply the proper stamps for the judgment in appeal.

Menikhami Gamarala *v.* The Crown, District Court, Chilaw, 256 B 264

See Criminal Procedure, 1.

Forgery—

See Evidence, 2.

Formal order—

See Civil Procedure, 22.

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Fraudulent deed— PAGE

Fraudulent deed—Want of consideration—Insolvency of grantor —Creditors, antecedent and subsequent to date of deed— English Law and Roman-Dutch Law—Ordinance No. 7 of 1853, s. 58.

A bond given without consideration by a person in a state of insolvency is void, as a fraud upon all persons who were creditors at its date and prejudiced by it.

A deed cannot be set aside as fraudulent by a creditor who becomes such after the date of the alienation, unless it be proved to have been made with an intention to defeat future creditors.

SILVA *v.* MACK, District Court, Colombo, 61,400 (Roche Victoria's case) 131

Fresh plaint—

See CIVIL PROCEDURE CODE, 3.

Gaming—

Ordinance No. 17 of 1889, ss. 5 and 18—Keeping a common gaming-place—Improper use of bagatelle table—Game of "Kurunégala rouge et blanc."

The game of bagatelle sanctioned by the Ordinance No. 17 of 1889, section 18, is not the game of "Kurunégala *rouge et blanc.*"

The occupiers of a house keeping a house for the playing of that game for stakes, and to which the public have access, are liable under section 5 of that Ordinance.

WIJERATNE *v.* PERERA, Police Court, Kurunégala, 3,643 176

Unlawful : *See* CRIMINAL PROCEDURE, 9.

Gemming—

Gemming without license—Criminal trespass—Section 427 of the Penal Code—Evidence necessary to support charge of criminl trespass—Ordinances No. 5 of 1890 and No. 10 of 1894.

Gemming without a license on the bank of a river flowing along the property of private owner is not punishable as criminal trespass under section 427 of the Penal Code without proof that entry on such land was made with intent to commit an offence as defined in section 38 of the Code, or to intimidate, insult, or annoy any person in possession of such property.

Unlicensed gemming on lands other than Crown property is punishable under Ordinance No. 5 of 1890, amended by Ordinance No. 10 of 1894.

MALHAMI MUHANDIRAM *v.* JUANISA, Police Court, Ratnapura, 10,804 86

Guardian—

Powers of : *See* CIVIL PROCEDURE, 16.

Guardianship—

Application for guardianship and curatorship—Buddhist priest and pupil in robes.

Where a Buddhist priest applied to be appointed guardian of his pupil in robes and curator of his property—

Held, that he could not be appointed as such, as he was not his father, or other proper person to be appointed, and as it did not appear that the minor was in possession of any property which required to be taken care of.

UPANANDA TERUNNANSE *v.* DEVAMITTA UNNANSE AND two others, District Court, Chilaw, 15 G .. 36

Application for : *See* CIVIL PROCEDURE, 16.

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Handwriting— PAGE
Comparison of : *See* EVIDENCE, 2.

Hunting dogs—
Damages by, liability of owner : *See* BRUTE ANIMAL.

Hurt to public servant—
See ARREST.

Husband and wife—
Husband and wife—Marriage in community—Death of husband—Right of widow to one-half of the property held in community—Necessity of administering whole estate.

Per Burnside, C.J. (Lawrie, J., dissenting).—Though by the Roman-Dutch Law the surviving wife acquires a right to one-half of the property held in community during the marriage, yet convenience and the necessity of avoiding multiplicity of suits demand that the whole estate of the deceased should, in the first instance, vest in the administratrix for disposal among the persons legally entitled to specific shares therein.

DONA MARIA *v.* DON PAULES DE SILVA, District Court, Colombo, 715 268

See THESAWALAMAI.

Impensæ utiles—
See CHRISTIAN MARRIAGE.

Implied contract between master of ship and consignee—
See SHIPPING, 2.

Incarceration of debtors—
Policy of the law as to : *See* CIVIL PROCEDURE, 34.

Indian cooly—
See MASTER AND SERVANT, 1.

Information of offence—
Omission to give : *See* CRIMINAL PROCEDURE, 6.

Insolvency—
Insolvency—Assignee's report—Practice of tradesmen allowing credit to persons of slender means.

The District Court should, in all cases of insolvency, insist on having a report from the assignee as to the conduct and dealings of the insolvent before adjudicating on his application for a certificate.

Observations on the improper practice of tradesmen allowing credit to persons of slender means, and thus encouraging them to run up heavy bills which they have no prospect of paying.

In the Matter of the Insolvent Estate of JOHN RAYNOR MACQUINE PRESSLIE, District Court, Badulla, 86 .. 321

See CIVIL PROCEDURE, 21.

Insolvency proceedings—
Security for costs in appeal in : *See* CIVIL PROCEDURE, 18.

Instalments—
Payment of decree by : *See* CIVIL PROCEDURE, 34.

Interest—
How to be decreed : *See* CIVIL PROCEDURE, 33.

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Interlocutory judgment in partition suit— PAGE

See PARTITION.

International law—

Authority of, in the consideration of jurisdiction of courts : *See* DIVORCE.

Interpleader –

See CIVIL PROCEDURE, 10.

Irregularity—

See CIVIL PROCEDURE, 3.

In recording evidence : *See* CRIMINAL PROCEDURE, 10.

Joint lessors—

Joint lessors—action for rent by one lessor for his share of rent—Subsequent action by joint lessors—Splitting of cause of action—Civil Procedure Code, s. 34—Cancellation of lease—rights of joint creditors.

A and B being joint lessors, A sued the lessee for his half share of the rent on the lease for a certain period, making B a party defendant to the action, and requiring them to show cause, if any, why judgment for half the rent should not go in favour of A. A recovered judgment. Subsequently both A and B sued the lessee for the other half share of the rent for the above period, and for the whole of the rent for a subsequent period, and for a cancellation of the lease.

Held, that this action was maintainable, and that it was not barred by section 34 of the Civil Procedure Code.

Held further, that in the case of joint lessors each can sue the lessee separately for his moiety of the rent.

Held further, that when a lease contains the stipulation that, in default of payment of rent by the lessee, the lessor should be at liberty to sue the lessee for a cancellation of the lease, the lessor is under no liability to seek a cancellation at the default, but that he may sue for and recover the rent at each of several defaults and sue for a cancellation of the lease at any subsequent default.

Per Withers, J.—When creditors have joined in stipulating for the payment of a sum of money, each is entitled to his quota of that sum. When several debtors join in promising to pay a sum of money, each is liable to pay a quota of that sum of money, and no more. This happens even when a plurality of debtors or creditors intervene by the death of a single creditor or debtor leaving several heirs-at-law.

BUDDHARAKITA TERUNNANSE *v.* GUNASEKARA, District Court, Colombo, letter B 206

Joint promissory note—

Joint promissory note—Right to sue the personal legal representative of a deceased maker jointly with the surviving maker.

A personal legal representative of a deceased maker of a joint promissory note cannot be sued jointly with the surviving maker. The only exception to this rule is the case of a partnership, where recourse may be had against the estate of a deceased partner.

VELLAYAPPA CHETTY *v.* SINNETAMBY *et al.*, District Court, Kurunégala, 612/M 420 350

Judgment-debtor—

Committal and discharge of, in " chambers " : *See* " COURT."

Order of Court on, to attend for examination: *See* CIVIL PROCEDURE, 9.

Release of, on terms : *See* CIVIL PROCEDURE, 34.

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Judgment— PAGE

Necessary findings in, in prosecution for quitting service : *See* MASTER AND SERVANT, 3.

Requirements of, in criminal cases : *See* CRIMINAL PROCEDURE, 1 and 8.

Judicial separation—

See DIVORCE.

Jurisdiction—

1. ———— *District Courts—Power of, to punish for contempt not committed* ex facie*—Appearance of accused—Plea to jurisdiction after application for time to adduce evidence—Ordinance No. 11 of 1868, s. 78—Power of Supreme Court to issue writ of prohibition—Contempts cognizable by Superior and Inferior Courts of Record.*

When a party appears before a District Court on a rule *nisi* issued on him to show cause why he should not be attached for contempt, and asks for time to adduce evidence he is not precluded from subsequently pleading to the jurisdiction of the Court.

A writ of prohibition is a remedy *ex debito justitiæ*, and lies before or after sentence, and it is not necessary that a party applying for it should, as in applications for injunctions, show that he would be otherwise without remedy.

If a party have two remedies given him by law the existence of one will not prevent his taking advantage of the other, particularly if the latter remedy is likely to be more prompt and certain than the former. And so, a writ of prohibition on a District Judge may issue in cases in which an appeal lies upon his orders.

A District Court is a Court of Record, and has power to punish summarily contempts committed in the face of the Court, such as insult to the Judge, interruption of the proceedings of the Court, disobedience to its lawful orders or process, obstruction to its officers in the execution of its processes or orders, &c.

District Courts cannot be viewed as representing in this Colony the Superior Courts of Law and Equity in England, and they have not the powers vested in these Courts as to summary attachment for contempts in respect of acts done out of Court.

The Supreme Court of Ceylon has all the powers for punishing for contempt, wherever committed in this Island, possessed by the Superior Courts of Westminster.

Semble, there is no distinct recognition in Roman-Dutch Law authorities of the right of a Judge to deal summarily with contempts not committed in the face of the Court, nor committed by way of obstruction to its orders, or with reference to any suit or proceeding pending in the Court.

In the Matter of the Application of JOHN FERGUSON for a Writ of Prohibition against the District Judge of Colombo 181

2. ———— *District Court—Jurisdiction to interfere in religious disputes—Right of holder of religious office to relief when disturbed in enjoyment of property attached to such office.*

A District Court has no jurisdiction to interfere in the concerns of religious communities unless, in the rules which any religious community has made for its members in relation to the religious object which it has combined to maintain, a civil element enters, which brings the matter within the sphere of the civil jurisdiction of the courts.

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A holder of an office who has been duly appointed thereto by the religious community to which he belongs will be supported in the exercise of that office, if there is attached to it as an incident some estate in tenure of or right to the possession and enjoyment of movable or immovable property. PAGE

MOHAMMADU LEBBE *et al.* *v.* KOREEN *et al.*, District Court, Jaffna, 2,384 351

Jurisdiction of Courts—

Authority of International law : *See* DIVORCE.

Jurisdiction of District Courts—

See CIVIL PROCEDURE, 4.

Jurisdiction of Magistrates of one Court—

See CRIMINAL PROCEDURE, 11.

***Jus Retentionis*—**

See CHRISTIAN MARRIAGE.

Land at disposal of Crown—

See FOREST ORDINANCE, 1.

Landlord and tenant—

Landlord and tenant—Denial of tenancy and of notice to quit—Evidence—Averment and proof of notice when not necessary.

A tenant, who disclaims to hold of his landlord and puts him at defiance, is not entitled to have the action against him dismissed for want of a valid notice to quit.

And in such action the plaintiff need not aver and prove any notice to quit.

MUTTU NATCHIA *et al.* *v.* PATUMA NATCHIA *et al.*, District Court, Kalutara, 1,032 21

Last will, construction of—

See FIDEI COMMISSUM.

Lease—

Lease—Specific performance of—Holding over.

A lessee is not entitled, by virtue alone of the title to possession passed to him by the lease, to maintain an action of ejectment against a stranger to the lease in respect of lands, of which he, the lessee, was never put into possession by his lessor.

Semble, that where a person is put into possession of land by the owner in pursuance of an invalid parol lease for a term of years, he cannot be ejected by that owner until his holding, whatever it is, has expired, or has been put an end to by a proper notice.

PERERA *v.* RODRIGO, District Court, Kandy, 76,122 .. 99

Leave to appear and defend—

See CIVIL PROCEDURE, 7.

Legal estate—

See TITLE TO IMMOVABLE PROPERTY.

Legal representative—

Of joint maker of promissory note, right to sue jointly with surviving maker : *See* JOINT PROMISSORY NOTE.

Lessee's right—

To bring possessory action or action *rei vindicatio* : *See* CIVIL PROCEDURE, 20.

Library—

Right of Secretary to sue on behalf of : *See* CIVIL PROCEDURE, 25.

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Maintenance— PAGE

Maintenance—Ordinance No. 19 of 1889, s. 8—Terms of original order of maintenance—Subsequent order enlarging previous order.

Under section 8 of the Ordinance No. 19 of 1889, if a Police Magistrate thinks that a child should be maintained until he or she attains the age of eighteen years, such time must be specified in the order of the Police Magistrate.

If an order is silent as to the time, it has no force after the subject of the order has attained the age of fourteen years, and a subsequent order extending the allowance for the maintenance until the child attains the age of eighteen years is *ultra vires*.

ESTE *v.* SILVA, Police Court, Galle, 3,179 .. 22

***Mandamus*—**

Ordinance No. 7 of 1886, s. 4—Right of householder to water service for private use—Duty of officer in charge of Waterworks to supply water on the premises—Application for a mandamus.

Under the Ordinance No. 7 of 1886 the Government is bound to supply drinking water within the Municipality of Colombo, but not on the premises of a householder for his domestic use.

Where there is a public standpipe in the neighbourhood of a house from which its owner is able to take water for his domestic use, and the officer in charge of the Waterworks is not prepared to recommend to the Government that the private supply asked for be granted—

Held, that such householder is not entitled to a *mandamus* on the officer to compel him to provide such service.

In re Application of CANAGARATNE for a *Mandamus* .. 34

Marriage in community—

See HUSBAND AND WIFE.

Master and servant—

1.———— *Ordinance No. 11 of 1865, s. 11—Ordinance No. 13 of 1889, s. 6, and Ordinance No. 7 of 1890, s. 1—Indian cooly—Quitting service without leave or reasonable cause—Moneys paid by superintendent to labourer for purposes other than wages due or anticipated—Arrears of wages due.*

An estate kankani employed on a monthly contract of hire and service, whose wages for ten consecutive months were admitted to be due and unpaid at the time of his quitting service after notice of less than one month, is not guilty of an offence under section 11 of Ordinance No. 11 of 1865, in the absence of proof that the sums of money alleged to have been advanced to him by his master were on account of anticipated wages.

The value of rice and clothes supplied to a labourer in the course of service and for his use as a servant, and money advanced to him for a similar purpose by way of anticipated wages, may be deducted in the computation of an account of what wages, if any, are due and unpaid at a certain date.

JACOB *v.* VELAIDEN KANKANI, Police Court, Kandy, 15,797 42

2. ———— *Master and servant—Ordinance No. 11 of 1865—Agreement to attend at certain places for wages for dragging fishing nets.*

A person who by a written contract undertakes for wages to attend at certain places for and in the work of dragging

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nets cast into the sea is not a servant within the meaning of the Ordinance No. 11 of 1865. PAGE

RODRIGO *v.* MEL, Police Court, Pánaduré, 12,529 .. 91

3. ———*Ordinance No. 11 of 1865, s. 7—Labourer—Contract of service—quitting service without leave or reasonable cause—Finding of Police Magistrate.*

In a prosecution under the Labour Ordinance of 1865 against a servant for quitting service without leave or reasonable cause, it is necessary that the Magistrate should, in the event of a conviction, state in his judgment the capacity in which the accused was employed in the complainant's service, so as to show that his quitting it without leave or reasonable cause constituted an offence against the Labour Ordinance.

Unless some definite term of service is expressed in a written contract for hire and service, it will be obnoxious to section 7 of Ordinance No. 11 of 1865, and the servant cannot be criminally punished under that Ordinance.

SOYSA *v.* APPUHAMY, Additional Police Court, Ratnapura, 3,062 323

Master Attendant—

Master Attendant and tindals of boats—Departmental inquiry—Ordinance No. 6 of 1865, ss. 23 and 40—Prosecution of offences against Ordinance.

A Master Attendant acting under section 23 of Ordinance No. 6 of 1865 can only withdraw or suspend a license, but he is not empowered by the Ordinance to take evidence on oath in any departmental inquiry, or to impose a fine as the result of such inquiry.

All offences against the Ordinance being made cognizable by the Police Courts by section 40, they should be dealt with in a regular criminal proceeding before such courts.

RODGERS *v.* TINDALS 126

Master of ship—

Liability of, for non-delivery of goods: *See* SHIPPING, 2.

Matrimonial Law of Ceylon—

See DIVORCE.

Merchandise Marks Ordinance.

Merchandise Marks Ordinance, No. 13 of 1888, s. 3—Offence thereunder—Election by accused to be tried before the District Court—Information by Attorney-General—Jurisdiction of District Court to entertain the information.

A District Court has jurisdiction to inquire into and determine into an offence punishable under the Merchandise Marks Ordinance, section 3, when the accused has elected, at the magisterial inquiry, to be tried by the District Court.

Upon such election, it is competent to the Attorney-General to exhibit an information to the District Court for the trial of the accused.

QUEEN *v.* VAIYAPURI, District Court, Colombo, 1,044 (Criminal) 92

Minor—

Contract by: *See* CIVIL PROCEDURE, 33.
Liability of, on promissory note: *See* CIVIL PROCEDURE, 33.
Power of attorney to: *See* CIVIL PROCEDURE, 26.

Minor's property, value of—

See CIVIL PROCEDURE, 1.

Misjoinder of accused—

See CRIMINAL PROCEDURE, 9.

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Mistake— PAGE
See CRIMINAL PROCEDURE, 6.

Money lent—
Summary procedure in action for : *See* CIVIL PROCEDURE 7.

Moneys paid by Superintendent to labourer—
See MASTER AND SERVANT, 1.

Mortgage—
Action on, against representative of mortgagor : *See* RES JUDICATA.

Mortgage decree—
Effect of, on representative of mortgagor : *See* RES JUDICATA.

Mortgagee—
Application of, to have representative appointed to deceased mortgagor : *See* CIVIL PROCEDURE, 23.

Motion for summons—
See CIVIL PROCEDURE, 20.

Motions, useless—
See CIVIL PROCEDURE, 22.

Motion to forward case in appeal—
See CIVIL PROCEDURE, 20.

Mudaliyar of district—
Right of, to sue for rent of Crown land : *See* FORESHORE.

" Muthusam "—
See THESAWALAMAI.

Next friend—
See CIVIL PROCEDURE, 1.

Next of kin—
Duty of, to report death of intestate : *See* CIVIL PROCEDURE. 8 and 28.

Notice of appeal—
See CIVIL PROCEDURE, 22.

Notice of revision—
See CRIMINAL PROCEDURE, 2.

Notice to quit—
See LANDLORD AND TENANT.

Order—
Disobedience of, if informal and *ultra vires* : *See* CONTEMPT OF COURT, 2.

Ordinances—
1844, No. 10, sections 33 and 36 : *See* ARRACK, 1.
1844, No. 10, section 37 : *See* ARRACK, 2.
1844, No. 21, section 20 : *See* FIDEI COMMISSUM.
1847, No. 6 : *See* CHRISTIAN MARRIAGE.
1853, No. 7, section 6 : *See* CIVIL PROCEDURE, 18.
1853, No. 7, section 58 : *See* FRAUDULENT DEED.
1863, No. 10, sections 4, 6, and 9 : *See* PARTITION.
1865, No. 6, sections 23 and 40 : *See* MASTER ATTENDANT.
1865, No. 11 : *See* MASTER AND SERVANT, 2.
1865, No. 11, section 7 : *See* MASTER AND SERVANT, 3.
1865, No. 11, section 11 : *See* MASTER and SERVANT, 1 ; COOLIES, &c.
1865, No. 16, section 90 : *See* PUBLIC NUISANCE.
1867, No. 4, sections 54, 56, and 58 : *See* CIVIL PROCEDURE, 2.
1867, No. 14, sections 7 and 15 : *See* TOLL.
1867, No. 18, section 18 : *See* CIVIL PROCEDURE, 8.

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PAGE

1867, No. 18, section 27 : *See* CIVIL PROCEDURE, 33.
1868, No. 11, section 78 : *See* JURISDICTION, 1.
1871, No. 22 : *See* TRUSTEE.
1871, No. 22, section 3 : *See* CIVIL PROCEDURE, 19 ; POSSESSION.
1877, No. 5, sections 31 and 32 : *See* CERTIFICATE OF TITLE.
1885, No. 10, chapter IV. : *See* CRIMINAL PROCEDURE, 1.
1886, No. 7, section 4 : *See* MANDAMUS.
1887, No. 6, sections 14, 20, and 37 : *See* PETROLEUM.
1887, No. 11 : *See* FALSE WEIGHTS.
1888, No. 1, section 16 : *See* CRIMINAL PROCEDURE, 5 AND 12.
1888, No. 13, section 3 : *See* MERCHANDISE MARKS ORDINANCE.
1889, No. 1, sections 55, 56, and 57 : *See* CRIMINAL PROCEDURE, 11.
1889, No. 5 : *See* BROTHEL.
1889, No. 13, section 6 : *See* MASTER AND SERVANT, 1.
1889, No. 13, sections 6 and 7 : *See* COOLIES, &c.
1889, No. 17, sections 5 and 18 : *See* GAMING.
1889, No. 19, section 8 : *See* MAINTENANCE.
1890, No. 1, section 42 : *See* CIVIL PROCEDURE, 24.
1890, No. 3 : *See* FOREST ORDINANCE, 2.
1890, No. 3, section 31 : *See* CIVIL PROCEDURE, 29.
1890, No. 5 : *See* GAMING, 1.
1890, No. 22 : *See* CRIMINAL PROCEDURE, 11.
1890, No. 22, section 12 : *See* CIVIL PROCEDURE, 10.
1891, No. 6 : *See* CRIMINAL PROCEDURE, 17.
1891, No. 13, section 10 : *See* ARRACK, 2.
1891, No. 14, section 26 : *See* CERTIFICATE OF TITLE.
1892, No. 1, section 9, sub-section 6 : *See* FOREST ORDINANCE, 2.
1894, No. 10 : *See* GEMMING.

Parent—

Right of, to sue for slander of daughter : *See* SLANDER.

Partition—

Partition—Ordinance No. 10 of 1863, ss. 4, 6, 9—Interlocutory judgment in action for partition—Final decree, effect of—Duty of Court in partition suits—Proof of title of co-owners—Adding parties—Proceeding where all co-owners cannot be ascertained.

The effect of section 9 of Ordinance No. 10 of 1863 is to give persons taking title under the decree in an action for partition under that Ordinance a title good against the true owner, but the decree referred to in that section is not the interlocutory decree of partition under section 4, but the final judgment under section 6 awarding shares in severalty, and entered after receipt of the return of the commission for partition.

The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.

After the Court is satisfied that the plaintiff has made out his title to the share claimed by him, it should direct inquiries to be made whether all the parties interested in the land are parties to the action, or have been served with notice, and, on being satisfied on these points, order a partition or sale.

If all the parties cannot be found, the Court may allot severally the shares of the persons who have proved their rights to them, and may sell the remainder of the land, retaining the balance of the purchase money, after payment thereout of a proportionate share of the costs of the action, until the owners come forward and prove their title to it.

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Dictum of Phear, C.J., in *Assena Marikar v. Usubu Lebbe, 1 S. C. C. 19*, disapproved. PAGE

Per Bonser, C.J.—(1) The District Judge should take care that the inquiry in a partition suit is not a perfunctory one. It is only after he is reasonably satisfied that all the owners who can be found are parties to the action, using, if necessary for the purpose, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties are entitled to certain shares, and directing a partition or sale, as the case may be.

(2) An interlocutory decree for partition under section 4 of the Ordinance, unless proceeded with, is useless for any purpose. It could not even support a plea of *res judicata*. Where such an interlocutory decree has been made, and not proceeded with, section 402 of the Civil Procedure Code should be applied by the Court, and its rolls cleared of the action.

Per Withers, J.—Claimants of shares who may have had notice of the proceedings only when the commissioner had taken steps to prepare his return should be let in, and their claims inquired into even if it should happen that they purport to modify the interlocutory judgment as to the shares of the actual parties to the record. After hearing the new claimants and the former parties, the Court may reform its interlocutory judgment.

PERIS *et al.* *v.* PERERA *et al.*, District Court, Colombo, 4,981/C 362

Penal Code—

Section 67 : *See* RIOT.
Section 199 : *See* CRIMINAL PROCEDURE, 6.
Section 259 : *See* FALSE WEIGHTS.
Section 427 : *See* GEMMING.

Petroleum—

Petroleum Ordinance, No. 6 of 1887, ss. 14, 20, and 37—Possessing or keeping petroleum—Proof of existence of a place licensed for storage of petroleum—Burden of proof as to exceptions.

A plaint alleging that the defendants possessed in their premises petroleum exceeding 50 gallons, contrary to section 14 of the Ordinance No. 6 of 1887, and thus became punishable under section 20, is not so bad as to make it wholly defective.

" Possessing " connotes " keeping."

The onus being on the accused to justify his keeping, it is not necessary under section 37 for a prosecutor to specify or negative in his plaint, or prove, any exception or exemption which does or does not accompany the description of offence.

In view of the rule made by the Governor in Council, that all petroleum landed in the Island should be carried at once to premises in respect of which a license has been granted, it is the duty of a person who desires to keep more than the permitted quantity, to provide himself with licensed premises, and it is not incumbent on the prosecutor to allege or prove the existence of a place which the Government can license for the storage of petroleum.

MACK *v.* TAMBI LEBBE *et al.*, Police Court, Batticaloa, 10,106 58

Plaint—

See CIVIL PROCEDURE, 3.
Motion to take off the file : *See* CIVIL PROCEDURE, 25 and 29.

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Police headman— PAGE

Power of, to arrest without warrant : *See* ARREST.

Police Magistrate—

Power of, to try lower offence, while charge for offence beyond his jurisdiction remains undisposed of : *See* CRIMINAL PROCEDURE, 3.

Police officer—

Omission by, to give information of offence : *See* CRIMINAL PROCEDURE, 6.

Possession—

Ordinance No. 22 of 1871, s. 3—" Uninterrupted and undisturbed possession."

Withers, J.—" Possession " of a land must be continuous, peaceful, and for a certain period.

It is " interrupted " if the continuity of possession is broken either by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it ; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing is not in occupation.

And possession is " disturbed " either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user.

Lawrie, A.C.J.—If the actual physical possession has never been interrupted, it matters not that the possessor has been troubled by law suits or by claims in execution or by violence. If he has succeeded in holding possession, such attempts to oust him only make it the more certain that he held adversely to those who disputed with him.

SIMAN APPU *v.* CHRISTIAN APPU, District Court, Colombo, 1,980 288

" Possession "—

Meaning of, as used in section 3 of Ordinance No. 22 of 1871 : *See* CIVIL PROCEDURE, 9.

Power of attorney not duly stamped—

See CIVIL PROCEDURE, 29.

Power of attorney to minor—

See CIVIL PROCEDURE, 26.

Prescription—

See TRUSTEE ; CRIMINAL PROCEDURE, 19.

Incompetency of plaintiff to plead, in suit under section 247 of the Civil Procedure Code, on behalf of his execution-debtor : *See* CIVIL PROCEDURE, 19.

Principal and agent—

Contract—Innocent misrepresentation—Principal and agent—Absence of authority to act for principal—Liability of agent for damages.

If A is induced to contract with B on the footing of an innocent misrepresentation, he would have a restitutive remedy against B, restoring to him what he had actually lost in consequence of entering into such contract.

If A is under a legal duty to tell the truth to B, he would be liable for the consequence of an innocent misrepresentation made by him under the belief of which B acted.

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Where A, without being armed with formal authority, professed to act as agent of B, and bade for at a public auction, and agreed to buy a house as such agent, and B repudiated the sale, and C, the vendor, sued A for damages,— PAGE

Held, *per* Withers, J., and Browne, A.J. (*dissentiente* Lawrie, A.C.J.), that, in the absence of fraudulent intent or recklessness, A was not personally liable in damages; and that he had not entered into a valid contract with C, nor was he under a legal duty to him to state the truth.

ARMITAGE *et al.* *v.* BROWN, District Court, Colombo, 3,819 257

2. ——— *See* CIVIL PROCEDURE, 26.

Private defence—
See ARREST.

Probate—
See CIVIL PROCEDURE, 22.

Proclamation of September 23, 1799—
See DIVORCE.

Prohibition, writ of—
See JURISDICTION, 1.

Promissory note—
Promissory note—Illegal consideration—Charge of criminal misappropriation against defendant—Promise not to press such charge, part consideration for note.

P, who had been charged before a Police Court with criminal misappropriation of goods entrusted to him by L, granted to L, during the pending of such case, a promissory note for part of the value of such goods and paid him the balance in cash, obtaining at the same time an acknowledgment from L that he had received in full the amount due to him "from P, the defendant in P. C. case No. 3,664."

Held that, as the debt due was not the only consideration for the note, but the agreement also not to prosecute any further the criminal charge then pending, the note was tainted with a bad consideration, and was void.

LOWE *v.* POLORIS, District Court, Chilaw, 608 .. 142

Liability of minor on: *See* CIVIL PROCEDURE, 33.
Summary procedure in action on: *See* CIVIL PROCEDURE, 7.

Public nuisance—
Ordinance No. 16 of 1865, s. 90—Beating of drums at night without a license—Public nuisance by religious body.

A religious body is not entitled to commit a public nuisance by the beating of drums and tolling of bells, and no license under section 90 of Ordinance No. 16 of 1865 will be a protection against proceedings under the Penal Code, though it may be a protection against proceedings under the Ordinance.

Holland v. Kapugama Terunnánse (P. C. Mátara, No. 80,576, 1 S. C. C. 90) and *Jansz v. Endoris (P. C. Galle, No. 1,582, 9 S. C. C. 204)* commented upon.

MARSHALL *v.* GUNARATNE UNNANSE *et al.*, Municipal Court, Colombo, 2,062 179

Public pathway—
See RIGHT OF WAY.

Public servant, causing hurt to—
See ARREST.

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Punishment— PAGE
See CRIMINAL PROCEDURE, 6 ; RIOT.
Aggregate : *See* CRIMINAL PROCEDURE, 14.
Enhancement of : *See* CRIMINAL PROCEDURE, 2.

Pupil of Buddhist priest—
See GUARDIANSHIP.

Purchaser in execution—
See TITLE TO IMMOVABLE PROPERTY ; REGISTRATION.

Questions and answers—
Under section 16 of Ordinance No. 1 of 1888 : *See* CRIMINAL PROCEDURE, 12.

Quitting service—
See MASTER AND SERVANT, 1 and 3.

Registration—
Priority of registration—Purchase at execution sale followed by possession and subsequent Fiscal's conveyance and registration—Interim private conveyance and registration.

A mortgaged some lands to B in April, 1886, the mortgage bond being registered in August, 1887. B having put the mortgage bond in suit, obtained a mortgage decree, himself purchased the lands in February, 1890, at the execution sale, and entered into possession. He delayed obtaining the Fiscal's conveyances till 1893, and they were registered the same year. Meanwhile A sold the lands to C in 1892, who registered his deed in 1892.

In a contest between B and C as to title to the lands—

Held, that B's title was superior.

Silva v. Tissera (9 S. C. C. 92) considered and followed.

Sinniah Chetty v. Babanis Appu (Wendt, p. 213), and *Government Agent v. Hendrickhamy (3 C. L. R. 86),* distinguished.

SILVA *v.* SILVA, District Court, Negombo, 1,563 .. 28

Rei vindicatio—
See CIVIL PROCEDURE, 13 AND 14 ; CHRISTIAN MARRIAGE.

Religious disputes—
Power of District Courts to inquire into : *See* JURISDICTION, 2.

Removal of arrack without permit—
See ARRACK, 2.

Resistance to police—
Inexpediency of trial by Police Superintendent acting as Police Magistrate of charges of : *See* ADMINISTRATION OF JUSTICE BY POLICE MAGISTRATES.

Res judicata—
Res judicata—*Action by mortgagor against representative of deceased mortgagee—Civil Procedure Code, s. 642—Effect of mortgage decree on such representative—Personal claim of representative to land mortgaged by deceased.*

A mortgage decree in an action brought against the representative, appointed under section 642 of the Civil Procedure Code, of a deceased mortgagee, will estop such representative from questioning the right of the mortgagor to mortgage the lands decreed executable.

If the representative, who was the widow of the mortgagor, was entitled to the land in her own right, she should not have assumed the representative character imposed on her.

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Per Lawrie, J.—Under a decree passed in such an action no other land can be seized in execution than those named in the decree as executable. PAGE

MOHAMADU LEBBE *v.* UMMA NATCHIA, District Court, Kalutara, 1,134 346

Revision—

See CRIMINAL PROCEDURE, 2; CIVIL PROCEDURE, 31.

Revisionary power of Supreme Court—

See CIVIL PROCEDURE, 27.

“ Right and Title ”—

See TITLE TO IMMOVABLE PROPERTY.

Right of way—

Right of way over a public footpath—Evidence of special injury to plaintiff.

In an action raised by the plaintiffs as owners of a certain garden for a declaration that they are entitled to a right of way over a public footpath (leading from their garden to a street in Kandy), which the defendant had destroyed, and that the defendant should be ordered to reconstruct the same and pay plaintiffs a certain sum of money as damages arising from their inability to use the same—

Held, that such action, in the absence of an allegation that the defendant had a land over which the footpath went, or the plaintiffs had a right of way over a land belonging to the defendant, could not be looked upon as a claim for a servitude on behalf of a dominant tenement, but should be treated as an action brought by a member of the public for obstructing a public pathway, and that, in the absence of proof of special injury to plaintiffs, such action was not maintainable.

DE SILVA *et al.* *v.* WEERASINGHE, District Court, Kandy, 8,482 308

Riot—

Punishment—Riot—Voluntarily causing hurt—Ceylon Penal Code, s. 67.

When five or more people assemble with the object of beating a particular person, and do beat him, they are guilty both of riot and voluntarily causing hurt; but inasmuch as the act of riot is made up of the offences of unlawful assembly and voluntarily causing hurt, which was the object of the assembly—

Held, that their case fell under section 67 of the Ceylon Penal Code, and that they should be punished for the principal offence of riot only.

Case of *Muniwala v. Davitha, Civ. Min.*, 11th December, 1895, disapproved.

THE QUEEN *v.* NANDUA *et al.*, District Court, Kandy (Criminal), 823 317

Roman-Dutch Law—

Applicability of, in matrimonial proceedings: *See* DIVORCE.

Rules and orders of 1833—

See CIVIL PROCEDURE, 18.

Sale, confirmation of—

See CIVIL PROCEDURE, 2.

Sale of minors' property by guardian—

See CIVIL PROCEDURE, 16.

Security for costs in appeal in insolvency proceedings—

See CIVIL PROCEDURE, 18.

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Security, power of Court to ask for, in summary procedure actions— PAGE
See CIVIL PROCEDURE, 7.

Seizure of property in execution—
See CIVIL PROCEDURE, 27.

Sentence for several distinct offences—
See CRIMINAL PROCEDURE, 14.

Sequestration, order of—
See CIVIL PROCEDURE, 4.

Shipping—

1. ——— *Shipping—Sailing rules—Collision between steamer and sailing vessel—Fault of sailing vessel—Damages.*

A schooner sailing in a direction of north-west by west sighted a white light on the port bow, which she mistook for the light of the Tuticorin lighthouse, and she made towards it. A few minutes afterward, noticing a red light, she concluded that a steamer was ahead, and put up a white light, porting her helm at the same time, which necessarily brought her across the course of the steamer.

The white light exhibited in the sailing vessel was observed in the steamer for a second or two and disappeared. The steamer held her course believing that the sailing vessel was pursuing a course parallel to hers, and that she would keep on in that course. In a few minutes the vessels collided and the schooner sank.

Held, that the schooner was materially in fault, and that if the steamer had left it to the last moment to take the proper measures for getting out of the way of the schooner, and had not acted with all the promptness which might have been expected under the circumstances, she too would have been in fault and liable to pay one-half of the damages caused.

But as the schooner did not carry the red and the green lights on her port and starboard sides, but held up a white light with as little prominence as possible, so that the steamer could not ascertain expeditiously what course the sailing vessel was taking, nor could get out of her course in due time, no fault could be attributed to the steamer upon which she can be made answerable for even half the damages sued for.

ARUMUKHAM *et al.* *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY, *Re* ss. Chanda .. 61

2. ——— *Shipping—Liability of master for non-delivery of goods received on board—Bill of lading unauthorized by master—Receipt of goods by chief officer as part of ship's cargo—Implied contract between master and consignor—Action by consignee—Evidence.*

The master of a ship has the whole conduct and management of the ship and everything on board in his charge and custody.

If he is not himself the owner of the ship, he has this conduct, management, and custody as agent of the owner.

The chief mate of the ship is the master's hand or servant to receive on board for him goods into his custody, but is not generally authorized to bind him by special promises.

Where, in a suit brought against the master of a ship for recovery of damages consequent upon non-delivery of goods received on board by his chief mate, it was proved that G. H. S. & Co., professing to act for the master (but without

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due authority), acknowledged in a bill of lading that C. A. had shipped certain goods to be delivered at the port of Colombo unto O. A., and it appeared that the chief mate of the ship had received the goods in question on behalf of the master from a Dock Company in London without instructions as to their destination, or to whom they were to be delivered in Colombo— PAGE

Held, that the master was not liable to O. A. on the bill of lading, or upon the implied contract created by the chief mate's acceptance of the goods on board, in the absence of proof that the Dock Company had contracted on behalf of O. A.

CAYLEY, Q. A., *v.* KERR, District Court, Colombo, 1,629 .. 199

Slander—

Slander—Action by parent and daughter for slander of daughter—Right of parent to sue—Proof of speail damage.

A father cannot sue for damages for slander of his daughter, although he may have felt pained by such slander.

To say of a Sinhalese woman of the Vellala caste, in the presence and hearing of many persons assembled at a dinner party, that she had run away with a Wahumpura man, is actionable as slander.

Proof of special damage is not necessary in Ceylon to sustain an action for slander.

APPUHAMY *et al.* *v.* KIRIHAMI *et al.*, District Court, Kégalla, 474 83

Special Commissioner's certificate—

Under Ordinance No. 5 of 1877 ; *See* CERTIFICATE OF TITLE.

Specific performance—

Action for specific performance of contract, or damages for breach thereof—Intention of parties—Form of decree.

Where plaintiff prayed for specific performance of a contract set forth in a deed which had been assigned to him, or in the alternative for damages, and it appeared to be the intention of the parties that the defendant should be ready to hand the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to hand over the price stipulated—

Held, that plaintiff was entitled to a decree for specific performance, and if it be found, for any valid reason, impossible to execute the conveyance ordered, the Court below should decree the defendant to pay to the plaintiff the damages claimed.

HOLMES *v.* ALIA MARIKAR, District Court, Colombo, C 5,507 282

See LEASE.

Stamp duty—

Reduction of amount of claim—Fall of suit from a higher class to a lower class of stamp duty—Right of party to use stamps appropriate to the lower class.

Where a plaintiff, by reducing his claim by amendment of plaint, reduces the class of the case, the stamp duty payable on proceedings after such amendment is as on an action in the lower class.

PERUMAL *v.* TERUNNANSE, District Court, Colombo, 6,667 213

Stamping power of attorney—

See CRIMINAL PROCEDURE, 29.

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PAGE

Street nuisances—
Inexpediency of trial by Police Superintendent acting as Police Magistrate of complaints of: *See* ADMINISTRATION OF JUSTICE BY POLICE MAGISTRATES.

Summary procedure—
See CIVIL PROCEDURE, 7.

Summary trial—
On evidence taken in non-summary inquiry: *See* CRIMINAL PROCEDURE, 3.

Superintendent of minor roads—
See TOLL.

Technicalities in Courts of Requests—
See CIVIL PROCEDURE, 25.

Technical objections—
See CIVIL PROCEDURE, 21.

Tenancy in common—
See FIDEI COMMISSUM.

***Thediathettum*—**
See THESAWALAMAI.

***Thesawalamai*—**
Thésawalamai—*Husband and wife*—Múthusam—Thediathettum—*Land bought by husband with money inherited by him—Separate property of husband.*

According to the *Thésawalamai* of Jaffna money inherited by a husband and converted into land does not form part of the *thediathettum*. Such land should be treated as his separate property, if the money can be ear marked.

JIVARATNAM *v.* MURUKESU *et al.* District Court, Jaffna, 25,089 251

Time—
Computation of, for appeal: *See* CIVIL PROCEDURE, 7.
For filing answer: *See* CIVIL PROCEDURE, 17.
Power of Court in cases of reference to arbitration to extend: *See* CIVIL PROCEDURE, 6.

Tindals of boats—
See MASTER ATTENDANT.

Title to immovable property—
Action for declaration of title by purchaser at a sale in execution, without conveyance from Fiscal—Validity of such action—Civil Procedure Code, s. 289—"Right and title"—"Legal estate."

Where a purchaser at an execution sale came into Court praying for declaration of title, without having a Fiscal's conveyance in his favour at the time of the institution of the action, and undertook to procure and produce such conveyance at the trial of the case—

Held, per Lawrie, A.C.J., and Withers, J. (*dissentiente* Browne, A.J.), that the action was not maintainable.

Withers, J.—Under the Code, the right and title of the judgment-debtor to immovable property sold by virtue of an execution writ is not divested by the sale until the confirmation of the sale by the Court and the execution by the Fiscal's conveyance.

The expressions "right and title" and "legal estate" used in section 289 are synonymous.

SILVA *v.* HENDRICK APPU, District Court, Galle, 2,540 .. 13

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Toll— PAGE

Ordinance No. 14 of 1867, ss. 7, 15—Superintendent of Minor Roads—Certificate of exemption.

Under section 7 of the Ordinance No. 14 of 1867 the Government Agent has no power to issue a certificate of exemption from toll of the carriages, carts, and horses of the Superintendent of the Minor Roads while used in the Public Service on the roads in charge of that officer.

DANIEL *v.* RODRIGO, Police Court, Pánaduré, 13,728 .. 383

Trial—

Conduct of : *See* CIVIL PROCEDURE, 5.

For giving false evidence before Judge before whom the evidence impeached had been given : *See* FALSE EVIDENCE.

Trustee—

Trustee and cestui que trust—*Prescription—Ordinance No. 22 of 1871.*

A trustee receiving money on behalf of his *cestui que trust* cannot set up a plea of prescription in bar of the claim of such *cestui que trust.*

ANTHO PULLE *v.* CHRISTOFFEL PULLE, District Court, Colombo, 444 120

Voluntarily causing hurt—

See RIOT.

Voluntary association—

Right to sue on behalf of : *See* CRIMINAL PROCEDURE, 25.

Wages, arrears of—

See MASTER AND SERVANT, 1.

Warrant in Sinhalese—

See CRIMINAL PROCEDURE, 10.

Warrant of arrest—

See ARREST.

Water service for private use—

See MANDAMUS.

Widow—

Duty of, to report death of husband : *See* CRIMINAL PROCEDURE, 28.

Widower—

Duty of, to report death of wife : *See* CRIMINAL PROCEDURE, 28.

Witness—

Witness remaining within hearing of evidence given in Court—Right of Court to reject evidence of such witness.

A Judge has no right to reject a witness on the ground that he remained in Court in contravention of an order to withdraw.

FERNANDO *v.* WELENIS APPU *et al.*, Police Court, Kalutara, 19,320 90

Writ against property—

See CIVIL PROCEDURE, 30.

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CASES

DECIDED BY

THE SUPREME COURT OF CEYLON,

THE COURT OF VICE-ADMIRALTY

IN THE ISLAND,

AND

HER MAJESTY THE QUEEN IN

HER PRIVY COUNCIL

ON APPEAL FROM THE

SUPREME COURT OF THE ISLAND.

UDUMA LEBBE *et al* *v.* SEYADU ALI *et al.*

D. C., Kurunégala, 857.

Civil Procedure Code, ss. 481 and 582—Appointment of next friend under s. 481—Certificate of curatorship under s. 582—Necessity for inquiry as to value of minor's property upon application for appointment of next friend.

A person who has been regularly appointed as next friend under section 481 of the Civil Procedure Code has a right to sue without a certificate of curatorship under section 582.

Per BROWNE, J.—A certificate of curatorship is necessary only for actions instituted (or defended) by a curator in his own name *qua* curator, and is not necessary for actions instituted (or defended) by a minor by his next friend or guardian *ad litem*.

In regard to the proviso of section 582, when application is made for the appointment of next friend or guardian, it is not necessary to inquire into the value of the minor's property. Such inquiry is necessary only when it is sought to appoint a curator generally, or for the limited purpose contemplated by that section.

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Per WITHERS, J.—If a next friend claims charge of a minor's property of the value of Rs. 1,000 or over for any of the reasons stated in section 582, he cannot institute an action with reference to that property, unless he first takes out a certificate of curatorship.

D. C., Kégalla, 160 (*2 S. C. R. 81, 3 C. L. R. 26*), commented upon.

THIS was an action in ejectment brought by the plaintiffs to recover certain lands which they averred they inherited from one Maimo Natchia, and from which they were ousted by the defendants. The fifth and sixth plaintiffs, Ossen and Mahommadu, being minors, the first plaintiff, their father, was, on his application, appointed their next friend for the purpose of this action. On the day of trial, the court *ex mero motu* called upon the plaintiffs' Proctor to show cause why the action should not be dismissed, on the ground that the first plaintiff's appointment as the next friend of the minors was invalid, because no certificate was obtained in accordance with section 582 of the Civil Procedure Code, and no inquiry was made to ascertain the value of the property.

After argument, the District Judge ordered that the case be taken off the trial roll to enable the first plaintiff to obtain the requisite authority to sue under section 582 of the Civil Procedure Code.

The plaintiffs appealed.

The case was argued before LAWRIE, A.C.J., and BROWNE, J., and judgment being reserved, it was, at the request of their Lordships, argued again before the Full Court (consisting of LAWRIE, A.C.J., and WITHERS and BROWNE, JJ.) on the 8th March, 1895.

Wendt, for the appellants.

Sampayo and *Blazé*, for the respondents.

Cur. adv. vult.

12th March, 1895. BROWNE, J.—

In this action fifth and sixth plaintiffs are minors, and before the action was instituted the first plaintiff, their father, was (by Mr. Dunuwille, Acting District Judge) appointed their next friend in order to institute this action of ejectment and for damages against the defendants. It is to be noted, however, that the application was not accompanied by a copy of the plaint proposed to be filed, as this Court (*2 C. L. R. 82* and *163*, and *1 S. C. R. 302*) has directed should be always done.

The appointment was, however, made, and has not been objected to on that ground.

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At the trial, however, the Court of its own instance (Mr. Mason, District Judge, presiding) ordered the action to be taken off the file, on the ground that the plaintiff's appointment as next friend was invalid, because (1) no certificate was obtained in accordance with section 582 of the Civil Procedure Code, and (2) no inquiry was made to ascertain the value of the property; leave was reserved to the plaintiff to rectify his procedure in these respects.

Plaintiff, however, in appeal contends that these requirements were unnecessary. The learned District Judge's order shows he held these necessary, because the defendants had questioned plaintiffs' assertion that the lands of the estate, whereof plaintiffs are heirs, were worth under Rs. 1,000, asserting they were of Rs. 3,500 value, and because in case No. 160 of the District Court of Kégalla (*2 S. C. R. 81, 3 C. L. R. 26*) this Court had suggested that, even if a next friend had been appointed under section 481, it would seem as if section 582 would prevent him from suing until he had also obtained a certificate of curatorship.

It is necessary, therefore, now to rule upon what was then only a suggestion; and in my humble opinion this necessity, that an appointment of a next friend should be supplemented by a certificate of curatorship, does not exist.

In the first place, chapter XXXV. of the Code nowhere so requires it; and it is to be remembered that the two procedures of a minor suing by his next friend, and of a curator obtaining his certificate for all purposes whatever, and, if need be, thereafter bringing an action, are entirely distinct in their nature. The minor may often, as here, be only a necessary party to an action brought by others, the result whereof may or may not give or ensure him a right to some property. It may be that that property and all else belonging to him may be so inconsiderable in value, and so safely guarded for him by his relatives, that not only would certificate of curatorship be unnecessary, but it would be a positive hardship to require it to be taken to his loss in the cost thereof. When, however, his interests require he should have a permanent curator who shall have right to litigate when necessary, but who very possibly may never have to litigate at all, but only to receive and apply the income of the estate, such curator must of course be clothed with the authority of a certificate.

These are the three possibilities: (1) a minor may himself sue by his next friend; (2) his duly appointed curator may sue for him; and (3) a relative of a minor whose estate is under Rs. 1,000, desiring to see the child's rights protected in some action which

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he may deem necessary to be instituted, may get a special *quasi* curatorship authority from the court limited to that one action only. This last is the object of the proviso to section 582. Certificate of curatorship is necessary only for actions instituted or defended by a curator in his own name *qua* curator, and is not necessary for actions instituted (or defended) "by a minor by his next "friend" (or guardian *ad litem*).

As regards the ground that no inquiry has been made as to the value of property, there seems to be some confusion. It would not have been necessary at all to inquire as to the value of a minor's property when application was made that a next friend or guardian should be appointed to aid him in litigation. Such inquiry need be made only when it is sought to appoint a curator generally or for the limited purpose contemplated by section 582 (proviso). But in this action the objection taken by defendant concerning value of property is that plaintiffs, as a body, could not sue without having administered their mother's estate, and this no doubt the Judge will yet have to determine according as he shall find what is the value of her estate.

The appointment of the next friend being otherwise unquestioned, this order must be set aside, but without costs, and the action remitted for trial.

WITHERS, J.—

The order complained of is one directing that the case be taken off the trial roll to enable the first plaintiff to obtain the requisite authority to sue under the 582nd section of the Civil Procedure Code.

The action is to recover lands alleged to be in the unlawful possession of the defendants. It is brought by the husband of one Pitcha Uma, deceased, to whose estate in the premises he and their children have (it is alleged) succeeded on intestacy.

The father sues for his own interest, and he claims to sue as the next friend of two of his children, the fifth and sixth plaintiffs. He himself is the first plaintiff, and his order of appointment as next friend is to be found at page 44.

The defendants appeared to the summons issued on the acceptance of the plaint and answered.

The trial was fixed for the 4th September. On that day the District Judge, of his own motion, called on the plaintiffs' Proctor to show cause why the plaintiffs' action should not be dismissed, on the ground that first plaintiff's appointment as next friend is invalid by reason of no certificate having been obtained under the

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provisions of section 582 of the Civil Procedure Code, and because no inquiry was made to ascertain the value of the property.

The value of the minors' property sought to be recovered must not be confounded with the whole inheritance.

The value of the inheritance is a question put in issue on the pleadings.

The property sought to be recovered in this action is assessed in the plaint at Rs. 400 only. That is not traversed in the answer. Two of the five children only are minors.

Their share of the premises, assessing it to be two-fifths of three-fourths of Rs. 400, is considerably under Rs. 1,000.

The appointment of the next friend was made with consent of the defendants, who raised no objection on the ground of the value of the minors' interest in the premises exceeding Rs. 1,000.

Hence, under section 582, the father was not disqualified to act as next friend even if he claimed to have charge of the fifth and sixth plaintiffs' share of the premises. But he has made no such claims, and because he comes forward to recover shares in land withheld from them, their adult brethren and himself, I fail to see why he should be considered to claim charge of their shares. *Non constat*, that he will not place the children in charge of their shares when recovered, or give them up to any one they nominate.

They consented to their father being appointed their next friend. Anyhow it seems to me that the utmost the Judge could do was to have the names of the fifth and sixth plaintiffs struck out as improperly joined, and to let the trial continue. But in my opinion the plaintiff should be allowed to carry on the action as constituted, and I would set aside the order and remit the case for trial.

Reading sections 481 and 493 together, I understand the Code to say that any person being of sound mind and full age, so long as his interest is not adverse to that of the minor, and he is not a defendant in the action, may, if he is otherwise a fit person, be appointed next friend of a minor.

If he *claims charge* of a minor's property of the value of Rs. 1,000 under a deed or will, or by reason of nearness of kin and otherwise, he cannot institute an action with reference to that property unless he first takes out a certificate of curatorship.

LAWRIE, A.C.J.—

In the Kégalla case reported in the 3rd volume of the *Ceylon Law Reports*, p. 26, I expressed the opinion that a next friend regularly appointed under section 481 must get a certificate of curatorship before he could bring an action in the name of the minors.

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I feel it difficult to reconcile some of the provisions of the 35th chapter with those of the 40th chapter of the Code. It is hard to ignore or to explain away the plain words of section 582, "no "person shall be entitled to institute or defend any action connected "with the estate of a minor of which he claims charge until he "shall have obtained such certificate."

Is the solution to be found in the words "of which he claims "charge"?

A next friend may have no pretension to have charge of the minor's property; perhaps if he does not a certificate is not necessary.

It is clear that in some circumstances a next friend may sue in the minor's name without getting a certificate; for instance, under section 590 the next friend may sue the curator.

I therefore concede that it is a reasonable construction of the 35th chapter, that a man regularly appointed under section 481 is clothed with authority to sue without getting a certificate, and also a man appointed under section 479 may defend without the same certificate.

I agree with my brother WITHERS, and in the result arrived at by my brother BROWNE, but not with all his comments on the Ordinance.

GABRIEL APPUHAMY *v.* PELIS PERERA APPUHAMY *et al.*

D. C., Negombo, 1,355.

Fiscal's conveyance to purchaser in execution sale—Ordinance No. 4 of 1867, ss. 54, 56, and 58—And Civil Procedure Code, ss. 283 and 286—Confirmation by Court—Proper time for conveyance.

Upon a sale in execution duly held in 1871 under Ordinance No. 4 of 1867, and no objection having been taken thereto within thirty days of the sale—

Held, per WITHERS and BROWNE, JJ. (LAWRIE, A.C.J., *dissentiente*), that it was competent to the Fiscal to pass a conveyance to the purchaser in 1893, and that such conveyance was valid. Such purchaser not being execution-creditor, an express order of court to convey is not necessary.

Held further, *per* WITHERS, J., that it was only sales of property held after the Civil Procedure Code came into operation that required an order of confirmation as a condition precedent to a Fiscal's conveyance.

THE land in dispute, in this case of ejectment, belonged to one Martelis Perera Appuhamy, who by deed No. 474, dated 16th May, 1870, leased it to one Domingo Fernando Rendrala for a

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term of twenty years, and put him in possession thereof. On the 31st August, 1871, the Fiscal of Negombo, in pursuance of a writ of execution issued against Martelis Perera, seized the land and sold it by public auction to the plaintiff, who bought it subject to the lease in favour of Domingo Fernando. On the death of the lessee, his legal representatives, by deed dated 11th August, 1874, assigned to the plaintiff the unexpired term of the lease and put him in possession of the land. He continued to hold it till the expiry of the lease, and thereafter on the 11th May, 1893, obtained from the Fiscal a conveyance of the premises in his favour, as purchaser in execution. The plaintiff averred in his plaint (filed on the 5th September, 1893) that the defendants, on the 28th February, 1892, entered upon the land, and, having ousted the plaintiff's lessee, were in unlawful possession thereof; and he prayed for declaration of title and for ejectment of defendants.

The second defendant only appeared, and in his answer he averred that the Court, by its order dated 7th February, 1893, had refused to confirm the sale in question, which was therefore no sale. He also pleaded that the Fiscal's conveyance was obtained by fraud ; and denying the ouster and unlawful possession complained of, he claimed the land as his own by right of purchase from Martelis Perera (from whom the plaintiff also professed to derive his title) by deed dated 11th March, 1892, and duly registered on the 12th March, 1892. He prayed for declaration of title and for dismissal of the plaintiff's action.

The Court framed the following issues :—

(1) Is the Fiscal's conveyance in plaintiff's favour void by reason of there being no authority of Court for its issue ?

(2) If valid, what is the effect of its registration ?

(3) If the conveyance be void, does the plaintiff's possession enure to his benefit ?

Upon argument, the plaintiff's action was dismissed with costs, and judgment was entered for the second defendant, declaring him owner of the land.

The plaintiff appealed.

The appeal was argued first on the 12th March, 1895, before LAWRIE, A.C.J., and WITHERS, J. And their Lordships not being able to agree to a judgment, it was argued again on the 5th April, 1895, before LAWRIE, A.C.J., and WITHERS and BROWNE, JJ.

Wendt and *Dornhorst*, for appellant.
Bawa, for respondents.

Cur. adv. vult.

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17th April, 1895. LAWRIE, A.C.J.—

The plaintiff averred that on the 31st August, 1871, he purchased the land in question at a Fiscal's sale held in execution of a writ against Martelis Perera.

The defendants in the present action said that they could not admit the fact of the sale in execution, and they put the plaintiff to the proof of it.

The only evidence of the sale adduced at the trial was a conveyance by the Fiscal dated in 1893 (twenty-two years after the alleged sale).

I shall, however, for the purposes of this judgment, assume that it has been proved that the sale in execution in 1871 was in all respects regular, and that the plaintiff, as purchaser at that sale, had a right then to get a conveyance from the Fiscal if he paid the price, supplied the stamps and survey fees, &c., required by the Ordinance No. 4 of 1876.

The plaintiff did not apply for or get a conveyance.

He was in possession of the land as lessee under a lease for twenty years, which expired in 1892; the former owner of the land transferred the land to the defendant in this action, who registered the transfer.

The plaintiff made two attempts to get the Court to authorize the Fiscal to grant a conveyance, and he failed. In one of these attempts the order of the District Judge was brought to this Court in appeal, and the order was affirmed.

Burnside, C.J., observed that in his opinion "no right exists "to call on a Fiscal to execute a conveyance . . . outside the "action in which the property has been sold," and he added he "knew of no law by which the Fiscal becomes liable to the whole "world to make a conveyance."

These observations were *obiter*, but they are valuable as having been expressed in regard to the right of this very plaintiff to get the conveyance on which he now founds his case.

Notwithstanding the refusal of the Court to compel the Fiscal to grant him a conveyance, the plaintiff went to the Fiscal, who (either ignorant of the proceedings already taken, or thinking that he was bound to grant a conveyance, or that he was entitled to do so) granted the conveyance of the 10th May, 1893, which recites that the sale was held on the 31st of August, 1871.

The learned District Judge framed this issue :—

"Is the Fiscal's conveyance in the plaintiff's favour void by reason of there being no authority of Court for its issue?"

The learned Judge decided in the affirmative. I think he was right. Fiscals have no common law rights, and are under no

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common law obligations to grant conveyances; they can do so only in strict conformity with the Civil Procedure Code. The older provisions of the Ordinance No. 4 of 1867 have been repealed.

By the present law a Fiscal cannot grant a conveyance unless he has before him a confirmation of the sale by the Court.

I can find nothing in the Code which gives a Fiscal an exceptional right to convey, without confirmation, if the sale was held before the Code came into operation.

There is a difference in the form of conveyance used under the Code and that used under the Ordinance No. 4 of 1867. There is also, I believe, some difference in the amount of stamp duty now exigible. I do not think it could be contended that a Fiscal now has right to issue a conveyance in the old form, or with the old amount of stamps (in this case it is the new form of conveyance which has been signed).

It seems to me that a Fiscal is so completely the creature of what remains of the Ordinance No. 4 of 1867 and of the Code that he has no right to attempt to transfer property except in strict conformity with these laws.

It is true that Fiscals holding office prior to August, 1890, had more discretion given to them in the matter of giving transfers than their successors since 1890 have had, but the Fiscal who gave the conveyance in 1893 had the lesser rights and powers, and the Fiscal gave (in that year) a conveyance without the confirmation of the Court. I venture to dissent from my brothers, and to express the opinion that he acted in excess of his powers, and that the conveyance is void.

Even under the old law, a Fiscal would, in my opinion, have exceeded his duty if after the lapse of ten years he had given a conveyance. Here twenty-two years had passed and new interests had been created.

WITHERS, J.—

I regret that I am unable to concur with my Lord. Under the Ordinance No. 4 of 1867 it was enacted in the 54th section that no sale should be held " bad on the ground of irregularity or informality, objection to which was not made within thirty days of the sale." If within that time no application was made under section 53 of the Ordinance to set aside the sale, on the ground of a material irregularity in the publishing or conducting it whereby the applicant sustained substantial injury, the sale was good, and could not be impeached. (See *Sillery's case* in *52 L. J., P. C. 7.*) In section 56 of the Ordinance it is enacted as follows: " If the Court shall not have disallowed the sale, and the purchaser shall

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"have paid the full amount of the purchase-money according to the "conditions of sale, and shall have supplied the Fiscal or Deputy "Fiscal with stamped paper of the proper amount required by law "for the conveyance of the land sold to him (which stamped paper "he shall be bound to supply when he pays the purchase-money in "full), the Fiscal or Deputy Fiscal shall make out and execute a "conveyance of the property according to the form hereunto "annexed, and marked J, in duplicate."

On the 10th May, 1893, the Fiscal assigned and delivered to the appellant the conveyance of property which had been judicially sold on the 31st August, 1871, the property being a reversion of the interest in the land on the expiry of a lease for a long term of years. It was the duty of the Fiscal to grant the conveyance and a privilege of the purchaser to compel the performance of that duty.

This is not a case under the 58th section of that Ordinance, in which an express order of the Court was required before the Fiscal could deliver a conveyance to the purchaser.

The Ordinance No. 2 of 1889, in section 2, expressly declares that the repeal of the Ordinance in the third column thereof (including, therefore, No. 4 of 1867) should not affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed. The right to call for the Fiscal's conveyance of the property sold in 1870 had accrued to the plaintiff before the Ordinance No. 2 of 1889 had come into operation.

In my opinion it is only sales of property held after the Civil Procedure Code came into operation that require an order of confirmation as a condition precedent to a Fiscal's conveyance, all other necessary conditions being fulfilled. To hold otherwise would be to give a retrospective effect to the Civil Procedure Code.

I would answer the District Judge's issue in the negative, and therefore in favour of the plaintiff, who is entitled to succeed.

[The foregoing judgment having been read, WITHERS, J., continued as follows :—]

I venture to adhere to the foregoing opinion which I first formed on the question submitted to us for decision, and that is, to quote the words of the District Judge, "Is the Fiscal's conveyance in "plaintiff's favour void by reason of there being no authority of "Court for its issue ?" I would therefore, for the reasons advanced in my former opinion, answer this question in the negative, and send the case back for all other questions properly raised in the pleadings or settled, as the case may be, to be decided in the Court below.

The appellant is entitled to his costs in appeal.

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I wish to add that I am quite unable to understand how the action in which the premises were bought and sold in execution of the judgment can be considered a pending one, so as to be affected by the provisions of section 3 of the Civil Procedure Code. Execution happened more than twenty years ago.

BROWNE, J.—

On 16th May, 1870, Martelis leased the land for twenty years. On 31st August, 1871, under a writ against him in the action 4,567, D. C., Negombo, plaintiff, not as execution-creditor, but as an outsider, bought the lessor's reversionary interest, but did not cause the Fiscal to execute a conveyance in his favour. On the 11th August, 1874, the plaintiff purchased the unexpired term of the lease and entered into possession, and possessed by himself or his lessee for the rest of the period of the original lease, *i.e.*, to 16th May, 1890, and thereafter until 28th February, 1892, when he was evicted by defendant. Martelis, eleven days subsequently to this eviction (11th March, 1892), professed to sell to defendant the land by a deed which defendant registered on the following day, the 12th. On the 10th May, 1893, plaintiff obtained his Fiscal's conveyance, and sued on the 5th September, 1893, for declaration of his title and ejectment of defendant.

Question has been raised whether the Fiscal, after the passing of the Civil Procedure Code, could legally have executed this conveyance without the sale having been confirmed by the Court under the provisions of section 283.

For the defendant it is submitted that the granting of the conveyance was a step in the procedure of the action, and that, as under section 3 of the Civil Procedure Code every action pending in any court on the 1st August, 1890, should be proceeded with to final judgment and execution, under the provisions of the Code confirmation of the sale was necessary, since the Code had repealed the provisions of part 9, sections 47–58, of the Fiscals' Ordinance, No. 4 of 1867.

For the plaintiff it is contended that the right or privilege of the plaintiff to obtain this conveyance, and the liability of the Fiscal to execute and grant it, was saved from repeal in his favour by section 2 of the Code.

I hold that the latter contention must prevail. It is not shown that the action 4,567 was still pending on the 1st August, 1890. The last entry in its journal is of date 12th December, 1871, and apparently shows that the creditor then received payment in satisfaction of his decree.

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The plaintiff-purchaser, after the expiry of the thirty days for objections, was in the same position as a purchaser who has arrived at the stage provided for in section 286 of Civil Procedure Code, and if in either case the result of the sale (and, under the Code, its confirmation) has been the entire satisfaction of the claim, the action is no longer "pending" and within the provisions of section 3. This procedure to execution terminated under No. 4 of 1867 on the expiry of the thirtieth day, when the sale was not challenged, and did not continue thereafter, viz., till confirmation of sale as under the Code, section 283. Consequently there was not any procedure to final execution necessary which section 3 should regulate and carry through.

Moreover, the right of the purchaser and the liability of the Fiscal, whose authority is still derived under part I. of No. 4 of 1867, still continued when this conveyance was executed. It has not been shown that the purchaser failed to pay according to the conditions and complete his purchase—rather the contrary; and the right and corresponding obligation under section 56 are clear, and are saved in plaintiff's favour by section 2 of the Code. It is however submitted that the plaintiff did not supply stamped paper for the conveyance in his favour when he paid the purchase-money in full; but it is not shown that the Ordinance in such a contingency and for such omission nullified the sale or gave the Fiscal right of parate execution—section 51 did not so provide, nor did the Ordinance prescribe what would result upon such default other than what we may suppose possible,—that the Fiscal might either decline to execute the conveyance till the stamps were supplied, or supply them, and tendering delivery of the executed deed require payment of their value, if necessary, by action for that purpose.

The judgment should therefore be set aside, and the first issue decided in favour of plaintiff.

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SILVA *v.* HENDRICK APPU.

D. C., Galle, 2,540.

Action for declaration of title by purchaser at a sale in execution, without conveyance from Fiscal—Validity of such action—Civil Procedure Code, s. 289—" Right and title "—" Legal estate."

Where a purchaser at an execution sale came into court praying for declaration of title, without having a Fiscal's conveyance in his favour at the time of the institution of the action, and undertook to procure and produce such conveyance at the trial of the case :—

Held, per LAWRIE, A.C.J., and WITHERS, J. (*dissentiente* BROWNE, J.), that the action was not maintainable.

WITHERS, J.—Under the Code, the right and title of the judgment-debtor to immovable property sold by virtue of an execution writ is not divested by the sale until the confirmation of the sale by the Court and the execution by the Fiscal's conveyance.

The expressions "right and title" and "legal estate" used in section 289 are synonymous.

THE facts of the case appear sufficiently in the judgments delivered by their Lordships.

The plaintiff appealed against the dismissal of his action.

Pieris and *Jayawardana*, for appellants.

Wendt and *Blazé*, for respondents.

Cur. adv. vult.

19th March, 1895. BROWNE, J.—

One Harmanis, having recovered judgment and issued writ against his debtors, was declared purchaser of the trees of a land at an execution sale held on 7th June, 1893. Before he obtained the Fiscal's conveyance, he on the next day assigned to plaintiff all his rights in the action and land, and empowered plaintiff to obtain the Fiscal's conveyance. In further execution of the writ plaintiff himself on the 11th July purchased the soil of the land.

Ere thirty days from the time that reports of the Fiscal to the Court could well have been made and orders confirmatory of sales and conveyances themselves thereafter could have been obtained, and in fact before these preliminaries were completed, the Fiscal on the 13th September seized for resale the same debtor's interest in the same land, and plaintiff thereupon claimed the land. His claim was rejected on the 21st December, and he instituted this action stating these facts in full, and thereby showing his title to the trees and soil was still imperfect, but expressly undertaking to perfect his titles ere trial and then to produce the Fiscal's transfers in his favour.

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Defendant, in answer, objected to the sufficiency of the declaration, in that the sale of the trees to plaintiff "is null and void "plaintiff's vendor not having any title in them to convey, he not "having taken out Fiscal's transfers for the same." And at the trial a preliminary issue of law was stated apparently by the Court: "Is the sale of 8th June, 1893, to plaintiff good, in absence of Fiscal's transfer?" Defendant further answered that plaintiff had not acquired title to the soil, in that he had not been substituted plaintiff on the original record, nor obtained the sanction of the Court to bid, and the Court framed another "preliminary issue of law and fact" thereon: "Did plaintiff's purchase of 11th July, 1893, pass title to plaintiff?" But defendant did not offer the proofs necessary to sustain such plea, and it is unnecessary to consider it.

Apparently plaintiff had obtained his transfers ere the trial and was ready to produce them, but the learned District Judge held that, as under section 289 the right and title of the judgment-debtor to property sold is not divested by the sale until the confirmation of the sale by the Court and execution of the plaintiff's conveyance, plaintiff had no title to the land when he filed his plaint, and so had no right to institute his action, which he accordingly dismissed with costs.

Now, as regards actual title to the land, this Court has, in accordance with the subsequent provision in section 289 that on subsequent execution of the Fiscal's conveyance the grantee is deemed to be vested with the legal estate from time of sale, frequently upheld as good a title originally imperfect for want of intermediate Fiscal's conveyance, but subsequently perfected by its having been obtained (*9 S. C. C. 32* and *92*, *1 S. C. R. 73*, *2 C. L. R. 192*), and I see no reason whatever why a plaintiff may not, before so perfecting a title, *i.e.*, when he has, not no title at all to land, but an imperfect title, capable of being easily perfected, institute an action to enforce his rights under that title against a disputant.

The action 11,092, District Court of Negombo (*S. C. M.*, *15 June, 1883*), was remitted by this Court with liberty to plaintiff to *obtain and* produce the Fiscal's conveyance necessary to complete her title, and apparently the plaintiff in 16,716, District Court of Negombo (*9 S. C. C. 92*), on being ousted in January, 1889, instituted that action ere he obtained his Fiscal's conveyance on 19th March, 1889. Such an action is of course instituted at the risk of the title being still imperfect at trial, and of its dismissal by reason thereof.

I would set aside the decree, with costs, and remit the action for trial.

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WITHERS, J.—

I understand the facts to be briefly as follows.

In the execution of a judgment against one Podi Sinho and one Avis de Silva, the execution-creditor, Harmanis Appu, caused to be seized and sold some thirty-two trees growing in a garden known as Maginagewatta, and himself became the purchaser at the Fiscal's auction. The sale under the writ took place on 7th June, 1893.

Before obtaining a Fiscal's certificate of transfer the buyer assigned his interest in the said thirty-two trees to the plaintiff. Indeed, his assignment was made on the 8th of June, the very next day.

Harmanis, the said execution-creditor, on the same day assigned the unsatisfied balance of his judgment against the said Podi Sinho and the said Avis de Silva to the plaintiff. In the following month, *i.e.*, the 11th July, 1893, the soil of the said Maginagewatta was sold in execution of a writ of the said Harmanis and purchased by the plaintiff.

The plaint is so carelessly drawn up, as not to say in execution against whom—Podi Sinho or Avis de Silva—or to whom the trees first and then the land were judicially sold as described.

I imagine it to be Podi Sinho's, as the cause of action is the seizure by the defendant on the 13th of September, 1893, of this very land in execution of a judgment he had recovered against the said Podi Sinho.

The plaintiff confesses that, when he instituted this action, he had not procured a transfer from the Fiscal either of the said thirty-two trees of the land Maginagewatta or of the soil of the said garden sold under his vendor's writs.

If the Fiscal had already sold this land in July, 1893, as Podi Sinho's property, how he came to seize it again in September under a writ against that person I find it difficult to understand, as I do his conduct in selling growing timber one day and the next the soil on which the timber grows; but in that district houses and growing trees are not regarded apparently as being attached to the soil.

However, as a matter of fact, the Fiscal did on the 13th September, 1893, seize this garden and advertise it for sale at the instance of the defendant. Nine days after the seizure plaintiff objected to the Fiscal selling this land. He claimed it as his, though I cannot find the terms of his claim or of the Fiscal's reference of it to the Court. He says that after inquiry his claim so referred to the Court was dismissed. Within fourteen days, under the 247th clause of the Code, he comes forward to establish

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his claim ; but what was his claim ? I suppose to the land as his own absolutely, but I have to guess at this fact. I shall assume that he did claim the land as one who had purchased it at a sale in execution, but had not obtained a Fiscal's transfer.

It appears that at some stage of the proceedings in this action the plaintiff procured from the Fiscal a transfer of the thirty-two trees and a transfer of the soil which had been judicially sold in June and July as above stated, but on the 16th of July, 1894, certain preliminary issues of law and of fact were discussed between the parties to this action, with the result that the District Judge dismissed the action with costs, on the ground that, when the plaintiff instituted the action, he had no cause of action, having no title in the land which defendant had seized, and the seizure of which was opposed by the plaintiff.

The Acting Chief Justice supports this ruling, but my brother Browne would allow the case to be remitted for plaintiff to prove his Fiscal's transfers to the said land and the said thirty-two trees, relying, as regards this course, on a judgment of this Court in appeal from a dismissal of a plaintiff's action in ejectment, on the ground that she had no proprietory title in the absence of a Fiscal's transfer, when the Court of appeal set aside the judgment and remitted the case, with liberty to the plaintiff to produce and prove her Fiscal's transfers, which in point of fact seem not to have been made out for a long time afterwards. This was an unreported case from Negombo in 1882 (*Perera v. Julihami*). My brother Browne also relied on those judgments of this Court which give effect to a Fiscal's transfer, so as to make it speak from the date of the sale under the writ.

There were no reasons given for the judgment in the Negombo case of 1882, and as that was before the Civil Procedure Code, I do not think it can help us. We have to consider the 289th section of the Civil Procedure Code, which enacts, "the right "and title of the judgment-debtor, or of any person holding under "him, or deriving title through him to immovable property sold by "virtue of an execution, is not divested by the sale until the "confirmation of the sale by the Court and the execution of "the Fiscal's conveyance. But if the sale is confirmed by the "Court and the conveyance is executed in pursuance of the sale, "the grantee in the conveyance is deemed to have been vested "with the legal estate from the time of the sale." What is meant by the words "legal estate," which are foreign to the Roman-Dutch law ? This section must be construed in reference to those which follow it, which limits the mode of user to the person in possession, be he the execution-debtor or the Fiscal as the purchaser's agent.

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The right and title of the judgment-debtor to immovable property sold by virtue of an execution is not divested by the sale until the confirmation of the sale by the Court and the execution of the Fiscal's conveyance.

The "right and title" is used as synonymous with the "legal "estate," a term well known in the English law, which it seems to me must be our guide in interpreting this part of the Code. We must go back to the statute of uses," and the judgment-debtor must be regarded as a trustee who has the fee simple in legal estate, while the purchaser in execution must be considered as having an equitable interest or estate. The title is in the trustee of a judgment-debtor, and the right to use the property for limited purposes is in him or the person in possession.

This right and title, such as it is, belongs to the trustee against all the world.

The purchaser, when thirty days have elapsed, must have the sale confirmed and procure a conveyance from the Fiscal. Having done that, the legal and the equitable estates unite, and he can force the trustee, *i.e.*, judgment-debtor or other person in possession of the immovable property, to surrender the land to him with an account of the profits.

That "right and title" or "legal estate" is a right of property which can be seized and sold in execution. It can pass by devise. It could be sold by private transfer, and the purchaser could in the course of time, if he remained in possession without acknowledging the purchaser's equitable title, and using the property as his own for ten consecutive years, perhaps regain a prescriptive title to the detriment of the purchaser. Two conditions are required by the purchaser before he can acquire absolute *dominium*—he must procure the Court's confirmation and the Fiscal's conveyance. It is admitted that the plaintiff had not done so when he instituted this action.

The difficulty that confronts us is the position of the purchaser, who, having made a claim similar to the plaintiff's, has to establish his claim within fourteen days of the order upholding the seizure under the provisions of the 247th section of the Civil Procedure Code. We have repeatedly held that, unless a claimant who has been defeated fails to come forward within fourteen days and establish his claim, the adverse order will be for ever conclusive against him.

Mr. Wendt argues here that the order which drives the present plaintiff to establish his claim will not do him a permanent injury. As soon as he procures the necessary confirmation of sale and Fiscal's conveyances he will be able to get possession of the land

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and enjoy it as the absolute owner. That may or may not be so. My brother Browne would save him from the possible consequences of an affirmance of the judgment he appeals from, by allowing him for his protection to put in evidence the orders of confirmations and the conveyances which it seems he has acquired in the course of the cause. I would co-operate with my brother if I thought the law of the procedure admitted it.

But I know of no provision which allows a plaintiff who has no title (*i.e.*, here a legal estate) when he institutes a suit, and who gains one in the course of a cause to make use of that acquisition in support of his claim, which is dependent on the particular title acquired. In *re Tottenham Local Board, 2 Times Reports, 410*, it was considered doubtful whether *matter not in existence at the date of issue of writ* can be introduced by amendment, but this is not an application for leave to amend.

The only satisfactory reason I can assign for the order in appeal in the Negombo case relied on is that, under Ordinance No. 4 of 1867, a purchaser, after thirty days from the Fiscal's sale, who had fulfilled all his conditions of sale, became the absolute owner of the land purchased under the contract of purchase and sale, and that the conveyance from the Fiscal was only evidence of the contract which it was indulgently permitted him to secure.

No doubt the grantee of the conveyance is vested with the legal estate from the time of the sale, but not for the purpose of saving a plaintiff who makes a claim before a Fiscal and institutes an action to establish that claim, without that which gives him a good cause of action.

The judgment must be affirmed, with costs.

Lawrie, A.C.J.—

When a plaintiff comes into Court praying for a declaration of title, he must possess at that time the title which he asks the Court to decree to be his. When this plaintiff brought this action he had not got a conveyance : he was not entitled to possession, he was not the owner of the land.

The action must necessarily be dismissed, with costs.

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SILVA *v.* DINEKEHAMY.

D. C., Galle, 3,285.

Civil Procedure Code, s. 247—Plaint presented within time, but rejected—Irregularity of accepting fresh plaint as amended plaint, though out of time.

No action solely and exclusively under section 247 of the Civil Procedure Code can be maintained if instituted more than fourteen days after the date of the order upholding the claim to the property seized in execution.

If a plaint is rejected, and is not put on the file of the Court, it cannot be said to constitute the institution of an action.

THIS action, which purported in the body of the plaint to be raised under section 247 of the Civil Procedure Code, prayed as follows :—" Wherefore the plaintiff, claiming the benefits of the " 3rd clause of Ordinance 22 of 1871, prays that his judgment-" debtors be declared entitled to the said premises, and that the " said property be declared executable under the said writ."

It appeared that the order of Court releasing the property and allowing the defendant's claim was made on the 28th September, 1894. The plaint was presented on the 10th October following, which was within the period of fourteen days allowed by the section. The District Judge rejected the plaint on the 12th October, " because " it was not clearly written, and the value of the property was in " the wrong place." A new plaint dated 10th October was presented on the 19th October, and was accepted on the 22nd October, the Court holding that its " order of rejection must be taken as an order " for amendment, and the new plaint must be treated as amended " and as presented on the 10th."

The Proctor for defendant, ere filing answer, moved that the action be dismissed with costs, on the ground that it was instituted too late. The District Judge disallowed the motion.

The defendant appealed.

Blazé appeared for appellant, and contended that the Court below should have dismissed the action.

Dornhorst, contra. An amended plaint is a subsitution of the original one (*2 C. L. R. 187*). The present order is not appealable, on the ground that there is sufficient material on the record to make the action in the alternative an *actio hypothecaria*. If so, it is not touched by the Code.

Blazé, in reply. By section 46 of the Code the time must be limited for amendment. But in this case the Court fixed no time. So, the order must be taken as directing the plaint to be amended then and there.

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21st March, 1895. WITHERS, J.—

We think it proper to affirm this order, refusing to dismiss the action on a motion made by the Proctor for the defendant on the date appointed for his client to appear and answer to the summons issued on the accepted plaint.

It has been argued before us that this plaint is not one exclusively within the provisions of the section 247 of the Civil Procedure Code, but contains an alternative claim, one being independent of those provisions. But this point was not taken before the Court below, and we come to the conclusion that the defendants should answer this plaint in such a way as they may be advised. What we do now decide is, that if this is an action solely and exclusively under section 247, it cannot be maintained, inasmuch as the action has been instituted more than fourteen days after the date of the order upholding the defendant's claim on the property seized in execution. A plaint was submitted to the Judge within the requisite time, but the Judge rejected the plaint for the reasons which he has recorded on the record at page 24. Not till the 22nd October, 1894, and therefore long after the prescribed time, was the present plaint submitted and accepted.

If a plaint is rejected and is not put on the file of the Court, it cannot be said to constitute the institution of an action.

It is because of the way the Judge intended to deal with the rejected plaint and of the concluding paragraph of section 46 of the Civil Procedure Code, which says that the rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action, that we allow this judgment to stand with the limitation mentioned before.

We cannot allow a fresh plaint in respect of an action under section 247, but only in respect of an action that lies outside that section.

Costs to abide the event.

LAWRIE, A.C.J.—

I agree. This is an action under section 247, which cannot be entertained, as the plaint was presented too late. In agreeing to send the case back for further proceedings, I express no opinion whether the plaint contains any other cause of action. That is a matter not yet dealt with by the District Court, and will be dealt with on the defendant's answer.

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MUTTU NATCHIA *et al* *v.* PATUMA NATCHIA *et al.*

D. C., Kalutara, 1,032.

Landlord and tenant—Denial of tenancy and of notice to quit—Evidence—Averment and proof of notice, when not necessary.

A tenant, who disclaims to hold of his landlord and puts him at defiance, is not entitled to have the action against him dismissed for want of a valid notice to quit.

And in such action the plaintiff need not aver and prove any notice to quit.

THE plaintiffs raised this action for the recovery of arrears of rent of a house alleged to be due from the defendants and for ejectment of the defendants therefrom. It was averred that the defendants occupied the house as their monthly tenants on condition of paying rent monthly till the end of the year 1891, but that in January, 1892, they questioned plaintiffs' title to the premises and refused to pay rent, and had been since then unlawfully withholding possession of the same, though they had received notice to quit.

The defendants, in their answer, traversed these allegations, and setting up title in themselves prayed for dismissal of the plaintiffs' action.

Two issues were framed :—(1) Had Plaintiffs a right of ownership to the house, and (2) did defendants hold under plaintiffs.

After examination of the plaintiffs, the Proctor for defendants contended that the notice given to the defendants was bad, as it was not a full calendar month's notice (*1 S. C. R. 352*). Upon further argument the District Judge dismissed the plaintiffs' action upon the ground that the plaintiffs had " no standing in view of the " valueless notice to quit said to have been served upon defendants."

The plaintiffs appealed.

Pieris, for appellants.

Perera, for respondents.

1st March, 1895. BROWNE, J.—

The plaint in this case sufficiently averred that the defendant, after entering and holding as tenant of the plaintiff, had disclaimed to hold of him and put him at defiance. It was unnecessary therefore that the plaintiff, as he did, should have averred or have sought to prove any notice to quit given by him to defendant, and defendant was not entitled to have the action dismissed because no valid notice was given.

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The decree of dismissal must therefore be set aside and the action remitted for trial, but as the plaintiff himself acted throughout as if such notice was necessary until apparently after the decree was pronounced, when he more clearly apprehended his position, he is not entitled to recover any costs of the proceedings up to and inclusive of this appeal from the defendant.

LAWRIE, A.C.J.—

I agree.

ESTE *v.* SILVA.

P. C., Galle, 3,179.

Maintenance—Ordinance No. 19 of 1889, s. 8—Terms of original order of maintenance—Subsequent order enlarging previous order.

Under section 8 of the Ordinance No. 19 of 1889, if a Police Magistrate thinks that a child should be maintained until he or she attains the age of eighteen years, such time must be specified in the order of the Police Magistrate.

If an order is silent as to the time, it has no force after the subject of the order has attained the age of fourteen years, and a subsequent order extending the allowance for the maintenance until the child attains the age of eighteen years is *ultra vires.*

IN this case for maintenance, the defendant, in obedience to an order of Court, had been paying monthly to his wife, the complainant, Rs. 6 for her maintenance and that of his two children. Subsequently the defendant refused to pay for the maintenance of his eldest daughter, on the ground that she had attained her fourteenth year. The Police Magistrate ordered that the maintenance should be continued till the child attained her eighteenth year, as she appeared to be not more than ten years, and was unable to earn her livelihood.

The defendant appealed.

Aserappa, for appellant.

27th March, 1895. WITHERS, J.—

This order must be vacated.

The Magistrate had no power to order the appellant to continue the allowance to his daughter until she had attained the age of eighteen years, inasmuch as that age had not been fixed in the original order for the child's maintenance.

The original order made on the 30th January, 1891, was based on the submission of the appellant to deposit Rs. 6 before the

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10th February following, and a similar sum on every succeeding month before the 10th day of such month. The terms of that order were unlimited as to time. Now, section 8 of Ordinance No. 19 of 1889 enacts as follows :—

"No order for an allowance for the maintenance of any child, "legitimate or illegitimate, made in pursuance of this order shall, "except for the purpose of recovering money previously due under "such order, be of any force or validity after the child in respect "of whom it was made has attained the age of fourteen years, and "after the death of such child. Provided that the Police Magistrate "may *in the order* direct that the payments to be made under it in "respect of the child shall continue until the child attains the age "of eighteen years, in which case such order shall be in force until "that period."

It is clear that if a child has to be maintained until he or she attains the age of eighteen years, that time must be limited in the original order. As, however, the original order was silent as to the time, it has no vigour after the subject of the order has reached the age of fourteen years. An order cannot be made upon an order.

QUEEN *v.* PODI BABA.

D. C. (Criminal), Kalutara, 618.

Defective warrant of arrest—Competency of a police headman as public servant to arrest a person charged with robbery, independently of a warrant—Causing hurt to such servant—Plea of private defence.

Causing hurt to a police headman, while in good faith and under colour of his office he was executing a defective warrant of arrest upon a person charged with robbery, is an offence under section 323 of the Penal Code.

And in the absence of any act on the headman's part to cause reasonable apprehension of death or grievous hurt, the right of private defence cannot be availed of against an arrest made by such public servant, who believed *boná fide* that he had the power to make the arrest.

THE accused having been charged with robbery, a warrant of arrest was issued against him, addressed to one Jayasuria, Deputy Fiscal and Mudaliyár of Rayigam kóralé, who entrusted it for execution to the complainant, Jayatilaka, Police Headman of Rambukkana. Upon arresting the accused, the accused caused him hurt by cutting him with a knife.

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The District Judge convicted the accused under section 323 of the Penal Code.

On appeal, *Jayawardana* appeared for defendant, and contended that the complainant had no authority to arrest the defendant, and that the warrant was informal because it did not disclose the district over which the signing Magistrate had jurisdiction, nor set forth sufficiently clearly the offence with which the defendant was charged.

Cur. adv. vult.

19th March, 1895. WITHERS, J.—

The question is whether the accused has been rightly convicted of an offence under section 323 of the Ceylon Penal Code, in that on a certain day in January last he voluntarily caused hurt to the prosecutor, being a public servant, in the discharge of his duty as such public servant. It was strenuously pressed upon me by Mr. Jayawardana that the warrant committed to the prosecutor was bad, and that the prosecutor had no power to execute it.

The prosecutor, one David Perera Jayatilaka, is a Police Headman of Rambukkana. The duty he was supposed to be discharging at the time the accused assaulted him was the execution of a warrant of arrest signed by the Police Magistrate of Pánaduré.

The warrant was produced before the Court, and is marked with the letter A. The warrant, it was urged, does not particularize with sufficient certainty the offence with which the person to be arrested under it stands charged, and it does not disclose the district over which the signing Magistrate has jurisdiction. In addition to these defects this warrant was not directed to the said David Perera Jayatilaka : it was directed to the Deputy Fiscal, Bandaragama.

That officer did not, as he might have done, endorse the name of D. P. Jayatilaka upon the warrant. Hence Jayatilaka was not authorized to arrest the accused under that warrant. I think the warrant should have specified the time and place of the committal of the offence, and that the local jurisdiction of the Magistrate to deal with it should have been disclosed on the face of the warrant. It is certainly clear that Jayatilaka was not authorized to execute the warrant.

Still, this is not a complete defence in the circumstances. Jayatilaka is a public servant, and might have arrested the accused on the charge of robbery without a warrant. He was acting in good faith under colour of his office. He was executing a warrant signed by the Police Magistrate of the district which had been

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handed to him for execution. He himself believed he had a right to execute it. In acting under it he did nothing to excite the reasonable apprehension of death or grievous hurt to the accused or to any one.

The 92nd section, sub-section 2, of the Penal Code enacts that "there is no right of private defence against an act which does "not reasonably cause the apprehension of death or of grievous "hurt, if done, or attempted to be done, by the direction of a "public servant acting in goood faith under colour of his office, "though that direction may not be strictly justifiable by law."

The conviction must therefore be affirmed.

MUTTIAH *v.* MUTTUSAMY *et al.*

D. C., Chilaw, 965.

Civil Procedure Code, chapter XLVII.—Power of Court to vacate an order of sequestration made on ex parte *motion.*

A District Judge can, on good cause shown by the party aggrieved, vacate an *ex parte* order of sequestration which has been made at the instance of the plaintiff, under the provisions of chapter XLVII. of the Civil Procedure Code.

THE District Judge having allowed sequestration on the *ex parte* motion of plaintiff, the defendant appeared and moved to vacate the order of sequestration. The Court held it had no power to do so.

The defendant appealed.

Van Langenberg, for appellant.

Bawa, for respondent.

Cur. adv. vult.

12th March, 1895. WITHERS, J.—

We are asked to decide an abstract and a concrete question in this matter.

The abstract question is one of pure law, and is this: Can the District Judge, on good cause shown by the party aggrieved, vacate an *ex parte* order of sequestration which he has made at the instance of the plaintiff under the provisions of chapter XLVII. of the Civil Procedure Code? Before I can declare that a District Judge has no power to vacate an order of the kind under these circumstances, I must be satisfied that the power is

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denied him either by express enactment or by clear implication in the Code itself. It being nowhere said that he shall not have the power, is the denial of such power to be clearly implied from the words of the Code ?

It was argued that we ought to imply a disqualification by reason of the following considerations : The provisions of this Code are taken from the repealed Ordinance No. 15 of 1856, with the exception of an important proviso to be found at the end of the 4th section of that Ordinance, viz., " Provided that such sequestration shall " in all cases be dissolved on the defendant giving security to the " satisfaction of the Court equal to the value of the property " sequestered."

Non constat that an *ex parte* order may not be dissolved on good cause shown by the party whose property has been sequestered on the *ex parte* application of the plaintiff ; *non constat* even that a District Judge may not in his judicial discretion in certain cases dissolve such an order on adequate security being furnished by the defendant.

Then we were asked to infer this qualification because in this chapter there is no provision for the dissolution of an order, as there is in the next chapter relating to injunctions. But there is this difference in these two chapters : in chapter XLVII. there is no provision for informing the defendant that the Court will be moved to sequestrate his property. In chapter XLVIII., except in very rare cases, a defendant must have notice given him of plaintiff's intended application for an injunction. If the defendant appears and shows cause against an injunction, the order is *inter partes*, and could not be opened up by the Judge except for the provisions in section 666. In ordinary circumstances he would have to appeal to this Court from an order *inter partes*. But in the present case the defendant would be without a remedy. He could not appeal to this Court because he had not applied to the Court below to set aside its *ex parte* order. This procedure has been repeatedly laid down by this Court as the right procedure.

I therefore do not hesitate to answer the question above stated in the affirmative.

As to the other and concrete question, it is this : Has the defendant shown good cause why the order of sequestration should not be dissolved ? He has shown very good cause in my opinion. There was no foundation for the order. There was no evidence that defendant was fraudulently alienating his property with intent to avoid payment of the plaintiff's claim, and, what is more, the plaintiff swore in support of his application for a mandate that defendant was indebted to him in the amount

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claimed under his bond. The bond is not for a debt at all, but is for damage, if any; and plaintiff makes out no case of damage in his affidavit. For these reasons I would set aside the order appealed from, with costs.

BROWNE, J.—

The learned District Judge refused to dissolve a sequestration he had granted, holding he had right to grant it *ex parte*, and even in cases of debts secured by mortgage, when the Court was (as he held he was) satisfied that the plaintiff had no adequate security.

In appeal the respondent has sought to support his ruling on the grounds that a Court has no power to dissolve a sequestration (save by consent) when once granted, even *ex parte*, for the reasons that (1) the Civil Procedure Code, by whose express provisions all procedure is concluded (*2 C. L. R. 63*), does not supplement the provisions of sections 651 and 653 by any provision to dissolve, such as is enacted in regard to dissolving injunctions by section 666, and removing receivers by section 674; and (2) the omission of the proviso enabling dissolution in the old procedure under Ordinance No. 15 of 1856, section 4, when adopting the rest thereof. And the absence of any provision of the effect of section 488, Civil Procedure Code (India), or of the provision for release of the debtor in the English Act while security of the defendant against damage is expressly required, indicates that such security was designed as a remedy substituted for discharge of person or release of property, and that these reliefs were no longer to be granted. I had so construed these provisions (when like objection was taken before me in the District Court, Colombo, in actions Nos. C/5,064 and C/5,373), though with reluctance, to hold that the Court had not the power to reconsider its own *ex parte* orders and discharge or release accordingly. In so holding, I would, however (and I believe I did), distinguish between cases where it was clear that the writ should never have issued owing to the absence of necessary material, *e.g.*, the affidavit of the plaintiff himself, or his substitutes authorized by section 655.

Accepting the decision of the rest of the Court that the District Court has no inherent jurisdiction in this respect which is not expressly given to it,—and I did not then feel justified in claiming for it,—I agree that the material on which this writ issued was insufficient, and that the order appealed from herein should be set aside, and defendant's motion allowed, with costs.

LAWRIE, A.C.J.—

In my opinion this sequestration was allowed on insufficient materials, and having been allowed *ex parte*, it ought to have been

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recalled on the motion of the defendant. I would therefore set aside the refusal now under appeal, and remit to the District Court to dissolve. I would give the defendants their costs of appeal.

The plaintiff did not make out a *primâ facie* case of fraudulent alienation by the defendants which entitled the plaintiffs to sequestration : something more is necessary than proof of sales ; some facts must be sworn to from which the Court can reasonably infer that the sales were not *bonâ fide* for fair value. Alienation is not enough, it must be a fraudulent alienation.

Of fraud I find no proof.

On the ground suggested that a District Court, having once *ex parte* allowed a sequestration to issue, cannot recall it, on good grounds shown by the defendant, all I can say is that I do not assent to so novel and, I think, so dangerous and unjust a rule. There is as a rule no appeal against an *ex parte* order. The proper course is to apply to the Court which made the order to vacate it on notice to the party who holds the order, and on showing good grounds that the order had been made on insufficient materials, or was otherwise wrong.

SILVA *v.* SILVA.

D. C. Negombo, 1,563.

Priority of registration—Purchase at execution sale followed by possession and subsequent Fiscal's conveyance and registration—Interim private conveyance and registration.

A mortgaged some lands to B in April, 1886, the mortgage bond being registered in August, 1887. B having put the mortgage bond in suit, obtained a mortgage decree, himself purchased the lands in February, 1890, at the execution sale, and entered into possession. He delayed obtaining the Fiscal's conveyances till 1893, and they were registered the same year. Meanwhile A sold the lands to C in 1892, who registered his deed in 1892.

In a contest between B and C as to title to the lands—

Held, that C's title was superior.

Silva v. Tissera (*9 S. C. C. 92*) considered and followed.

Sinniah Chetty v. Babanis Appu (*Wendt, p. 213*), and *Government Agent v. Hendrickhamy* (*3 C. L. R. 86*), distinguished.

THE lands which formed the subject of dispute in this case were mortgaged to plaintiff by one Sinnappu Silva in April, 1886, and the mortgage bond was registered in August, 1887. Under a mortgage decree obtained by plaintiff against his mortgagor, the

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premises were sold by the Fiscal in February, 1890, and were purchased by plaintiff, who entered into possession soon afterwards. But the conveyances from Fiscal were obtained only on 21st March and 13th May, 1893, and were registered on 22nd May, 1893. Meanwhile, on the 12th December, 1892, the plaintiff's mortgagor sold the lands to the defendant, who registered his deed on the same day.

The plaintiff, averring ouster and dispossession by defendant, brought this action praying for declaration of his title and ejectment of defendant. Defendant denied the alleged ouster and set up title in himself under the deed of 12th December, 1892.

The District Judge dismissed the plaintiff's action, holding that the defendant's title must prevail.

The plaintiff appealed.

Wendt, for appellant.

Bawa, for respondent.

Cur. adv. vult.

17th April, 1895. WITHERS, J.—

The appeal, in my opinion, is entitled to succeed.

The case of *Sinniah Chetty v. Babanis Appu* (*Wendt, p. 213*) relied on by the District Judge is not in point; there, the land was sold before the mortgage decree, and the creditor could not procure a valid judgment against the land in which the purchasers in possession were not joined. Here, the land was sold after the mortgage decree, and could be levied in execution under that decree without any fresh action. But the decree was followed by a judicial sale of the premises affected by it, and so far as regards these premises it was an executed decree.

Mr. Bawa argued that the competition was between the mortgage decree and defendant's private conveyance, and that the circumstances of the mortgage decree differentiates this case from that of *Silva v. Tissera* (*9 S. C. C. 92*), which the District Judge felt to be in point, but tried to escape from its influence. But, as I have just said, the decree had been executed, and the competition is between the confirmed sale thereunder followed by possession and the private conveyance of the defendant. Mr. Bawa asked us to overlook the fact of plaintiff's possession following on the judicial sale, but we cannot do so, for I have no doubt of its occurrence. The present circumstances being then precisely similar to those in *Silva v. Tissera*, we are bound by that judgment. This case again differs from *Government Agent v. Hendrickhamy* (*3 C. L. R. 86*), for the land there was the subject of a judicial sale between the mortgage decree and execution thereof.

Set aside, and judgment for plaintiff, with costs.

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BROWNE, J.—

Hamuddra Sinnappu, by his mortgage bond dated 6th April, 1886, and registered 4th April, 1887, mortgaged two lands to plaintiff, who upon his bond obtained a mortgage decree, which he did not register. At the Fiscal's sale held in execution of his writ on 7th February, 1890, he was declared the highest bidder, and the sale being confirmed by the Court he entered into possession.

While he was so in possession, Sinnappu, on the 12th December, 1892, conveyed the same lands to his son-in-law, defendant, who registered his conveyance on that date.

On the 15th January, 1893, defendant ousted the plaintiff from possession, and plaintiff having obtained his transfers from the Fiscal on the 21st March and 13th May, 1893, which he registered on the 22nd May, 1893, sued on the 13th March, 1894, for declaration of his title and ejectment of defendant.

The learned District Judge has dismissed plaintiff's claim, holding that in place of suing on the strength of his Fiscal's transfers, he should have framed his action to enforce his mortgage rights against the defendant, as had been held in *Wendt, 213*, and that not having done so his defeat was certain, for that the only competition here was between the rival conveyances, plaintiff's mortgage being merged in his transfer, and the registration of his mortgage not enuring to the advantage in priority of the conveyance (*3 C. L. R. 72*), and that in such competition defendant must by priority of registration prevail. He admits that the decision in *9 S. C. C. 92* appears to be in point, but declines to follow it, as it was there held that registration had no bearing on the question at issue, but he cannot exclude it from consideration.

I do not see how it was possible for the decision in *Wendt, 213*, to be made applicable. There, the purchase from the mortgagor was (as I read the report, for no dates are given) anterior to the sale in execution under the mortgage decree, while here, the conveyance to defendant was two and a half years after plaintiff had been confirmed in his purchase, wherefrom, under section 289, Civil Procedure Code, he must now be regarded as having been vested with the legal estate so long before defendant professed to have acquired title from the mortgagor. An *actio hypothecaria* would therefore not lie against defendant.

As regards whether the Fiscal's conveyance should be held to relate back to the sale which Mr. Bawa contended should be decided in the negative, if this were a case purely under the operation of Ordinance No. 4 of 1867, the decisions in *9 S. C. C. 32* and *36* would be applicable; but here, though the sale in execution to the plaintiff was held in February, 1890, before the

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operation of the Civil Procedure Code, and although application to the Court for its confirmation was as unnecessary as we hold it was in 1,355, D. C., Negombo, plaintiff did, after 1st August, 1890, viz., on 12th January, 1893, obtain confirmation of his purchase under the new procedure, and may possibly claim that section 389 operates in his favour.

The contest is therefore not between plaintiff's registered bond and defendant's conveyance, as Mr. Bawa has urged, but between plaintiff's deed as of date 7th February, 1890, registered on 22nd May, 1893, and the conveyance to defendant, both dated and registered the 12th December, 1892, with (superadded to the former) the fact of plaintiff's possession, which was not an element of consideration in *Wendt, 213*, and was in *9 S. C. C. 92*. This case differs from *3 C. L. R. 86*, in that there the purchaser under the mortgage decree not having obtained his conveyance on the date as on which the rights of parties had to be ascertained, the contest lay between the unregistered mortgage decree and the registered conveyance by the mortgagor granted thereafter.

The decision in *9 S. C. C. 92* therefore is clearly applicable. The equity of the plaintiff will here, as there, prevail, and there is the less reason to regret this, in that the defendant has not shown as in such a contest, and especially in regard to his relationship to his vendor, that his deed was for valuable consideration.

I would set aside the decree and enter judgment for plaintiff as prayed, with costs.

MUTTUSAMY PILLAI *v.* PONNEN KANKANI.

D. C., Kandy, 8,064.

Practice—Conduct of trial—Tender of evidence—Judge's refused to admit it—Necessity for recording refusal and reasons therefor—When such refusal is good ground for granting a re-hearing of case.

A party accepting a Judge's ruling or opinion as regards the relevancy of evidence which he proposes to offer, without making any effort to produce it, takes the risk upon himself of losing the case for want of such evidence.

If a Court refuses to take any evidence tendered, counsel should not submit to such refusal, but should either call the witnesses, propose the questions to be put to them, and have the reasons for the Judge's refusal recorded, or should ask him to record that he would not entertain any evidence on the point in question.

THIS was an action by the payee against one of two makers of a joint and several promissory note.

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The defendant pleaded payment and satisfaction by payment to the superintendent of Templestowe estate, in consideration of whose advances to the defendant on the security of the plaintiff the note in suit was made. Issue being joined, the defendant led evidence in support of his plea and closed his case. Thereupon the proceedings recorded showed that plaintiff was called and his case closed. The District Judge upheld the plea of payment and dismissed plaintiff's action.

Plaintiff appealed. In his petition of appeal he stated the plaintiff's counsel "offered to prove" that the note in question was given for a debt due by the defendant alone, and that the note had no connection with the other maker's advance account on Templestowe, which did not commence till almost a year after the date of the making of the note; and the appellant complained that the District Judge refused to admit such evidence on the ground of irrelevancy. These allegations in the petition of appeal were supported by an affidavit, and the District Judge admitted their correctness.

Dornhorst, for appellant, argued on the merits and pressed for a re-hearing of the case in the Court below.

Wendt, for defendant.

Cur. adv. vult.

19th March, 1895. WITHERS, J.—

[After dealing with the merits of the case, said :—]

Mr. Dornhorst invited our attention to his application for leave to his client to call rebutting evidence and to prove that the payment deposed to by Allagan was for an estate matter between himself and the deceased Welayan, and had nothing to do with the note sued on, which was for a money consideration between himself and the defendant, and which was simply backed by the said Welayan as a security.

We reserved the consideration of his application. We find ourselves unable to accede to Mr. Dornhorst's application, and so we affirm the judgment according to our first intention. We do so for the simple reason that defendant's Proctor should not have submitted to the District Judge's refusal to take the evidence which he proposed to call on behalf of his client, the nature of which appears not in the record but in the affidavit, and which the District Judge advised himself he should not take because of its irrelevancy.

The defendant or other witness should have been called, and the questions proposed to be put to him recorded, with reasons for refusing them to be put, or at least the plaintiff's Proctor

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should have asked the District Judge to record that he would not entertain any evidence directed to a certain point.

A party must not take the District Judge's opinion and make no effort, simply on the chance of securing a judgment without evidence on his side, and then, if he loses, apply to this Court to send the case back for him to take the active measures which in his own interest he should have taken at the trial below.

Lawrie, A.C.J.—

[After commenting on the facts of the case, said :—]

The plaintiff called no witnesses to corroborate his statements and to contradict the evidence given by the witnesses for the defendant. He says he told the District Judge that he had witnesses in attendance to prove that the note in question was given for a debt due by the defendant alone in respect of transactions which took place on and before 21st July, 1892, and that the note had no connection with deceased maker's advance account on Templestowe, which did not commence until June, 1893. This evidence was not called by the plaintiff, he says (in an affidavit presented at the hearing in appeal), because the District Judge thought such evidence would be irrelevant. Now, if the plaintiff accepted this ruling or opinion, he took the risk of the District Judge deciding against him. He could not split the trial in two and take his chance of the Judge's finding for him on the evidence before the Court; and if the judgment turned out to be against him, to ask for a re-hearing to call witnesses whom he abstained from calling at the trial.

It is different when a District Judge makes an order refusing to allow certain questions to be put. Against such refusal an appeal is competent; but no order was made here: the plaintiff acquiesced in the opinion of the Judge, and he closed his case, and after some days' consideration the Judge decided against him. In these circumstances, I am not disposed to allow a re-hearing, and on the evidence before me I think the judgment for the defendant is right.

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In re Application of CANAGARATNE for a *Mandamus*.

Ordinance No. 7 of 1886, s. 4—Right of householder to water service for private use—Duty of officer in charge of Waterworks to supply water on the premises—Application for a mandamus.

Under the Ordinance No. 7 of 1886 the Government is bound to supply drinking water within the Municipality of Colombo, but not on the premises of a householder for his domestic use.

Where there is a public standpipe in the neighbourhood of a house from which its owner is able to take water for his domestic use, and the officer in charge of the Waterworks is not prepared to recommend to the Government that the private supply asked for be granted.

Held that such householder is not entitled to a *mandamus* on the officer to compel him to provide such service.

MR. H. J. C. CANAGARATNE appeared in person and moved for a rule on Mr. MacBride, the Director of Public Works, to show cause why a *mandamus* should not be issued on him to provide water service to the private residence of the applicant. He submitted an affidavit and also correspondence which passed between him and the Director and others on the subject of the water service he required.

In the affidavit Mr. Canagaratne set forth that he was a resident of Colombo; that he applied to the Director of Public Works for private service of water to house No. 121, Jampettah street, Colombo, where he lived, and which belonged to him; that, not being favoured with an answer, he wrote to the Provincial Engineer, and was informed on the 23rd January last that private service could not be given him; that no reason was assigned for the refusal; that he personally interviewed him subsequently, when the Provincial Engineer promised to inspect his house, which, however, he did not do; that thereupon he complained to the Member of the Municipal Council for St. Paul's Ward, where the house in question was situate; that the reason for the refusal was then stated to be that the house in question could only be classed as B 4, being a small house, not entitled to special connection with the main pipe; that, so far as he (the applicant) knew, there was no authority for such a classification; that the Director of Public Works was, he verily believed, the only person empowered by Government to allow a private service of water under Ordinance No. 7 of 1886, section 4; that several smaller houses than the applicant's had been allowed private service of water; and that he could not ascertain upon what principle houses were allowed water service.

Their Lordships (LAWRIE, A.C.J., and WITHERS, J.) having heard Mr. Canagaratne, refused his application.

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22nd March, 1895. LAWRIE, A.C.J.—

A party applying for a *mandamus* must make out a legal right and a legal obligation. In my opinion the applicant has made out neither. He incidentally states that he resides in a house, 121, Jampettah street, Colombo, of which he is the owner; but neither residence nor ownership give him a legal right to what he says he wants, viz., a private service of water. Provision was made by Government nine or ten years ago for a good supply of water for the town of Colombo, and by the Ordinance 7 of 1886 it was provided (section 4) that the Ceylon Government may, on application by the owner or occupier of any house, allow a private service of water to such house for domestic purposes, in such quantities and under such conditions as the Government deem reasonable. This seems to me to leave to Government the duty of considering each application for a private water service supply. It may be that the supply from Labugama is insufficient (there being only one main pipe) to allow of every house having a private supply; it may be that in some parts of the town it is more difficult to give the supply than in others. Government reserved to itself (or perhaps, strictly speaking, the Legislature expressly gave to Government) the duty of supplying the citizens with water under such conditions as the Government deemed reasonable. It did not confer on any citizen the right to have a supply of water for his private use. The wants of the public have first to be considered, and the officer addressed by the applicant says that he is not prepared to recommend that the private supply asked for be granted. It seems to me there is an end of the matter, unless, indeed, the applicant should address some higher officer of Government in the hope of the subordinate's ruling being reversed. He need not come to the Supreme Court, which is ready to issue writs of *mandamus* on all judicial officers who fail or exceed in the duties connected with the administration of justice, but which is slow to interfere in matters not judicial with which this Court can have no special knowledge, and which the Legislature has left to officers who are not judicial, over whom in the ordinary course this Court does not claim jurisdiction.

WITHERS, J.—

Under the Ordinance referred to, namely, No. 7 of 1886, the Ceylon Government is bound to supply a quantity of *drinking* water within the Municipality of Colombo; but it is not bound to supply water on the premises for the domestic use of the owner or occupier of the house within the Municipality. It may do so on his application, in such quantities and under such conditions

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as the Government deem reasonable. The power of allowing a private supply of water to a house so situate for domestic purposes has been placed in an officer called the Waterworks Engineer. No doubt there are cases in which a person who has a discretion to do or not to do something by statute has been compelled by *mandamus* to do what he refused to do capriciously. But it is quite unnecessary to consider this matter from that point of view. The applicant for a rule against this officer admits that there is a public standpipe in the neighbourhood of his house from which he is able to take water for the domestic use of himself and his household. This is, no doubt, not so convenient to him as if the water were laid into his house. But his ability to obtain what he requires, though perhaps at some considerable inconvenience, in my opinion precludes him, in the circumstances of this case, from applying for this specific remedy. For this simple reason I would refuse the application.

UPANANDA TERUNNANSE *v.* DEVAMITTA UNNANSE AND TWO OTHERS.

D. C., Chilaw, 15 G.

Application for guardianship and curatorship—Buddhist priest and pupil in robes.

Where a Buddhist priest applied to be appointed guardian of his pupil in robes and curator of his property—

Held, that he could not be appointed as such, as he was not his father, or other proper person to be appointed, and as it did not appear that the minor was in possession of any property which required to be taken care of.

THIS was an application by the petitioner, the incumbent of Ponnankania Viháré, for an order directing the grant to him of a certificate of curatorship in respect of the property of the first respondent, a minor. The petitioner also prayed to be appointed as the guardian of the minor, who was said to be the lawful pupil of the petitioner, according to Sisyanu Sisya Paramparawa, and who as such was being maintained and educated by the petitioner. A schedule of property was filed, and the Court made the following order:—

"Most of the property included in the schedule submitted appears "to belong to the Pikkalana temple, and is vested in the trustees "thereof. I am not aware that the Pikkalana temple has

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" been exempted from the operation of the Buddhist Temporalities " Ordinance. The incumbent priest of the temple and the trustee " thereof should be made parties respondent to this application."

They were so added, whereupon the petitioner moved for an order *nisi* under section 384 of the Civil Procedure Code. The District Judge refused an order *nisi*, holding, " the Buddhist " Temporalities Ordinance, No. 3 of 1889, is in force and cannot be " ignored. Personal claims by Buddhist priests, monks, or pupils to " temple property (in this case the Pikkalana Pansalawatta), which " is by law now vested in the trustee thereof, cannot be entertained."

The petitioner appealed.

Bawa, for appellant.

Cur. adv. vult.

2nd April, 1895. Lawrie, A.C.J.—

I am of opinion that the petitioner has not shown good reason why a curator of the property and guardian of the person of the minor should be appointed, and certainly he has not shown good reason why he (the applicant) should be selected.

As the minor is in robes as a pupil-priest, he must be of sufficient age to be able to take some interest in this application, but so far as appears he did not go to Court to assure the Judge of his willingness to have a curator appointed.

It is I think obvious that the object in view is to bring actions. If the minor needs to vindicate his property and his rights in Court, it will be better that he should apply to the District Judge for the appointment of a next friend, and the Judge will then have the opportunity of satisfying himself whether there be a *primâ facie* prospect of success before he allows litigation in the name of the minor.

In affirming the order I must add that I am at a loss to understand why the trustee of the viháré was made a respondent, or what he or the provisions of the Buddhist Temporalities Ordinance have to do with this application.

The application is refused, (1) because the applicant is not the father of the minor, and he has not shown that he is the proper person to be appointed ; (2) there is no property of which the minor is in possession of which it is necessary that the curator should take care. If litigation be contemplated, the interests of the minor can be looked after by a next friend.

Withers, J.—

I concur.

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PUNCHIRALA *et al.* v. SUDDAHAMY *et al.*

D. C., Kurunégala, 718/499.

Reference to arbitration—Power of Court to extend time after expiry of the time originally fixed—Civil Procedure Code, s. 683.

Under section 683 of the Civil Procedure Code, a court may enlarge the time on cause shown, when the time originally allowed for the making of the award has expired.

THE facts of this case appear in the judgments of their Lordships LAWRIE and BROWNE.

Bawa, for defendants appellant.

Blazé, for respondents.

Cur. adv. vult.

1st March, 1895. LAWRIE, A.C.J.—

The order of Court referring the matters in dispute to arbitration was dated 28th February, 1894. It required the arbitrator to make his award within thirty days. On the 24th March, the arbitrator wrote to the Court asking for an extension of time and desiring record of Court be sent to him, for some reason not explained. No notice was taken of this letter till the 2nd April, when the District Judge enlarged the time for filing the award till 30th April. The question to be decided is, Had the judge power to enlarge the time after the time originally fixed had elapsed?

The rule of English law was, that without the consent of parties the Court could not at common law grant any enlargement when the time had lapsed. The authority of the arbitrator was gone, and all the proceedings already taken became ineffectual (*Halden v. Glasscock*, and *Teasdale v. Atkins:* Russell on Arbitrators, page 150). This was remedied in England by the passing of an Act of William the Fourth, and now the Arbitration Act of 1889 enacts that the time for making an award may from time to time be enlarged by order of the Court, whether the time for making the award has expired or not.

Our Code is not so explicit as the English Act of Parliament, but after some little hesitation I come to the conclusion that the 683rd section permits a Court to enlarge the time on cause shown when the time for making the award has expired.

This seems to me the only question of doubt. The other objections to making the award the basis of the decree seem to me untenable. I agree with my brother that the order should be affirmed.

BROWNE, J.—

The award of the arbitrator was filed in Court on the 27th April, and notice thereof was issued. The defendants could then

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(section 687, Civil Procedure Code) have applied to set aside the award, or to modify and correct it, or to remit it for reconsideration, if they advanced grounds such as sections 691, 688, and 690 respectively indicate as those respectively appropriate for each form of relief.

Defendants petitioned that the award should be set aside, but did not advance any of the grounds *a*, *b*, or *c* prescribed by section 691 as those upon which alone such a motion could have been granted. The order of the District Judge rejecting the petition should therefore be affirmed.

I agree that the wording of section 683 is large enough to enable the Court to grant a further time to the arbitrator even after the expiry of the original period, when, as here, neither party had on the expiry called for the trial to proceed.

ALLIE *v.* MOHIDEEN.

D. C., Colombo, 5,454.

Civil Procedure Code, chapter LIII.—Summary procedure on action on promissory note and claim for money lent—Right to summons thereon—Leave to defendant to appear and defend—Power of Court to call on defendant to give security.

The summary procedure allowed by chapter LIII. of the Civil Procedure Code is applicable only to actions in which the claim is for money due upon certain classes of documents.

When a plaintiff has a second cause of action as for money lent, he is not entitled to a summons in the form No. 19, and the plaint should be returned for amendment.

If a defendant shows sufficient cause why the decree passed against him for default of appearance should be set aside, he is entitled to be allowed to enter into his defence, and he cannot be called upon to give security except for good reasons.

THIS was an action on a promissory note alleged to have been made by the defendant in favour of the plaintiff. The plaint contained two causes of action : one upon the note itself, and the other for money lent in respect of the very sum which was secured by the note.

The plaint was accepted and summons in the form No. 19 allowed on the first cause of action alone, under section 703 of the Civil Procedure Code. As defendant did not enter appearance

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on the returnable day, decree was entered against him. Thereafter his counsel moved to set aside the decree, and to be permitted to appear and defend the action.

The District Judge allowed the motion on condition that defendant gave security for the amount claimed and filed his answer on or before a day named.

The defendant appealed against that part of the order which required him to give security for the amount claimed as a condition precedent to his defending the action.

Bawa, for appellant.

Sampayo, for respondent.

Cur. adv. vult.

24th January, 1895. LAWRIE, A.C.J.—

The summary procedure allowed by the 53rd chapter of the Code is applicable only to actions in which the claim is for money due on certain writings. When a plaintiff has a second cause of action, such as a claim for money lent, he is not entitled to a summons in the form No. 19.

Here the plaintiff sued on a promissory note, but, probably fearful lest some technical defect might be found in the note or in the stamp, he added to the claim on the note a claim for money lent. The District Judge properly refused to give summons as prayed for. He ordered summons to issue on the first prayer only. It would have been better had the learned Judge returned the plaint for amendment by the deletion of the second count, but although the second count still remains in the plaint the defendant has not been summoned to answer to it, and for the purposes of this appeal I think we may treat the action as laid only on the note.

The defendant did not appear within the time fixed in the summons, and decree was entered for the amount of the note. After decree the defendant appeared, and the Court set aside the decree. The District Judge was satisfied that there existed special circumstances which justified him in doing so, and that there were such is plain from the fact that the plaintiff acquiesced and did not appeal, but when the Judge gave leave to the defendant to appear and defend, he imposed the terms that he should find security for payment of the whole sum claimed. The learned Judge gave no reason for attaching that condition.

If a defendant shows sufficient cause why the decree should be set aside, he is entitled, as a matter of right, to be allowed to enter into his defence, and he can be forced to give security only for some good reason.

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A defendant in an action under the 53rd chapter must disclose a defence. If that defence be not *primâ facie* sustainable, or if the Court feels reasonable doubts as to its good faith, it may impose the terms of payment into Court or of finding security. Possibly when a decree has been entered, the Court may impose terms for some other good reason. The discretion given in the 707th section may possibly be greater than that given in the 704th, but in the ordinary case the directions of the 704th section must apply to the terms which the Judge is permitted to impose when he sets aside a decree. By satisfying the Court that there are special circumstances why the decree should be set aside, and by filing affidavits of a defence, the defendant put himself in the same position as he would have been in had he appeared in time. I see no reason why he should be required to find security in the former, if he would not have needed to find it in the latter.

The defence here is that the defendant did not make the note. That is a defence *primâ facie* sustainable. The learned Judge does not say that he had any reason to doubt its good faith. In these circumstances, I am of the opinion that the defendant has been unduly prejudiced by that part of the order which requires him to find security, and I recommend that that be deleted.

I would give the defendant the costs of the appeal; he did not appear in time in the District Court and he must bear the costs in the Court below.

I agree to the addition proposed by my brother Withers.

WITHERS, J.—

I agree in the order proposed by my brother Lawrie, and am inclined to add a direction that paragraphs 4 and 5 of the plaint be struck out, unless plaintiff elects to treat this as an ordinary regular action. Chapter 53 must be strictly construed, and in my opinion no plaintiff should be allowed to proceed under this chapter who joins with a claim for a debt or liquidated demand in money upon a bill of exchange, promissory note, cheque, instrument or contract in writing, or a liquidated amount of money, a claim on a contract which does not answer to any of the preceding kinds of contract. It matters not one whit to my mind that the second cause of action is for the same amount as that claimed under the first cause of action, as is the case here when the debt on the contract of money lent at defendant's request forms the consideration for which the promissory note was given, and is the subject of plaintiff's alternative claim.

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JACOB *v.* VELAIDEN KANKANI.

P. C., Kandy, 15,797.

Ordinance No. 11 of 1865, s. 11—Ordinance No. 13 of 1889, s. 6, and Ordinance No. 7 of 1890, s. 1—Indian cooly—Quitting service without leave or reasonable cause—Moneys paid by superintendent to labourer for purposes other than wages, due or anticipated—Arrears of wages due.

An estate kankani employed on a monthly contract of hire and service, whose wages for ten consecutive months were admitted to be due and unpaid at the time of his quitting service after notice of less than one month, is not guilty of an offence under section 11 of Ordinance No. 11 of 1865, in the absence of proof that the sums of money alleged to have been advanced to him by his master were on account of anticipated wages.

The value of rice and clothes supplied to a labourer in the course of service and for his use as a servant, and money advanced to him for a similar purpose by way of anticipated wages, may be deducted in the computation of an account of what wages, if any, are due and unpaid at a certain date.

THE charge against the accused was that, being a labourer on an estate on a monthly contract of hire and service renewable from month to month, he did on the 27th March, 1893, before the end of his term of service, quit the complainant's service without leave or reasonable cause, or without giving a month's previous notice, in breach of section 11 of Ordinance No. 11 of 1865.

The superintendent of the estate stated in his evidence that the accused was one of his kankanis, that he had no reasonable cause for quitting service, and that he was largely indebted to the estate when he left it, but he admitted that when the accused quitted his service wages for about ten consecutive months were due to him and his coolies.

On appeal against a conviction, the judgment of the Court below was set aside and defendant acquitted.

3rd August, 1893. WITHERS, J.—

My interpretation of the Labour Ordinance is that, as regards labourers on estates employed otherwise than in domestic service, only advances by way of anticipated wages can be taken into account in computing what, if anything, is due to a labourer by way of wages earned by him at the date of his committing the offence of quitting service without leave, or reasonable cause ,or due notice determining the service.

Just as the value of rice and clothes supplied to a labourer in the course of service and for his use as a servant, so may money, advanced to him for a similar purpose, be deducted in the computation of an account of what wages, if any, are due and unpaid at a certain date and for a certain period.

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Here, it is admitted that wages earned during ten months had not been paid to this accused, so that wages for a series of months after the expiry of the last month of the series had not been paid him within sixty days thereof. But it was argued that the unsettled advances to this accused so altered the state of accounts between employer and labourer that a sum was due by the latter to the former. It is not proved, nor is it likely, that these large sums were advanced to him for the purpose I have indicated, and I cannot see my way to support the conviction.

SINCLAIR *v.* RAMASAMI KANKANI.

P. C., Hatton, 16,987.

Ordinances No. 11 of 1865, s. 11, and No. 13 of 1889, ss. 6 and 7—Loans to kankani for procuring coolies—Agreement to repay such loans by wages earned—Effect of such agreement on the criminal liability of the kankani under the Labour Ordinances—Meaning of "advances."

Loans made to an estate kankani for procuring coolies cannot be debited to him in the settlement of wages due to him, as such loans are not "advances" in the sense of the term explained in section 12 of the Ordinance No. 13 of 1889.

Even if there was an agreement between the labourer and his employer that such loans should be set off against wages due, it cannot have the effect of making him criminally liable under the Ordinance if, at the time of quitting service, the monthly wages earned by him shall not have been paid in full within sixty days from the expiration of the month during which such wages have been earned.

THE facts of this case are fully stated in the judgment of the Supreme Court.

Dornhorst and *Seneviratne*, for the accused appellant.

Van Langenberg, for respondent.

Cur. adv. vult.

10th May, 1895. LAWRIE, J.—

The accused, a head kankani, who had a gang of coolies, took service under the complainant in September, 1894. It is not said on what estate he (the accused) and his coolies had formerly served, but it is clear that they owed money, and that the complainant advanced to the accused Rs. 1,000 to be paid to his creditors, to enable him to clear accounts and to come to the estate. The accused gave two promissory notes for these advances of Rs. 1,000.

After the accused and his coolies had been on the estate for about two months and a half, the accused got a further advance of Rs. 1,000 from the complainant for the purpose of procuring and bringing to the estate some more coolies; the accused succeeded in getting more coolies, who joined his gang.

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For this advance of Rs. 1,000 the accused gave a third promissory note. There is evidence, which the Magistrate believed, that after the first advances were made, and about the time the last advance of Rs. 1,000 was paid, the complainant and the accused arranged and agreed that "these loans and advances should be "repaid in a special way, if the complainant should so desire, viz., "by accused's wages as earned being set against them as part pay- "ment." On the 1st January, 1895, there was a pay day on the estate, and the wages to the end of October were paid. I understand that the accused then received his wages in cash, and that the agreement that the complainant might retain them in part payment of the debt on the promissory notes was not taken advantage of by him.

At the end of February the accused wished to leave the estate with all his coolies; the complainant objected. On the 27th February there was a meeting with a Proctor on behalf of the head kankani, who made an offer to pay the Rs. 2,000, but that offer was rejected by the complainant. The accused then left the estate, but next day (28th February) he was tried in the Hatton Police Court for the offence of quitting service without leave or notice, and on the 22nd March he was found guilty and sentenced to three months' rigorous imprisonment. Hence this appeal.

The 7th section of Ordinance No. 13 of 1889, as amended by section 2 of the Ordinance No. 7 of 1890, enacts that no labourer shall be liable to punishment ...... for quitting service without leave or reasonable cause, if at the time of such alleged offence the monthly wages earned by him shall not have been paid in full within sixty days from the expiration of the month during which such wages have been earned.

The 6th section enacts that, in computing the amount of wages due to a labourer for any period of service, such labourer shall be debited with the amount of all advances of money made to him, and with the value of all food, clothes, or other articles supplied to him during such period, which the employer is not liable to supply at his own expense. The words "during such period" are material; old advances may not be taken into consideration, only advances or supplies made within the period for which wages are claimed and the subsequent sixty days. Here the employer had paid Rs. 1,000 to the accused in December subsequent to the month of November for which the accused pleads his wages were not paid. Was then the advance of Rs. 1,000 in December an advance which can be computed in ascertaining whether wages were due on the 27th February?

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In endeavouring to fix the meaning of the words " all advances of money " made to a labourer, I hold that an advance is different from a loan. It is competent to turn to the 12th section of the same Ordinance to see what there is meant by an advance : it there means " money, food, clothes, or other articles which had been " advanced or supplied to the labourer as against the wages for " which he may be suing."

In Jacob's case (P. C., Kandy, 15,797, decided on 3rd August, 1893), my brother Withers said :—" My interpretation of the " Labour Ordinance is that only advances by way of anticipated " wages can be taken into account in computing what, if anything, " is due to a labourer by way of wages earned by him at the date " of his committing the offence of quitting service without leave."*

This is a direct authority which I with confidence follow, but the complainant urges that by custom, and in this case by special agreement, the advance of Rs. 1,000, made in December was an advance to be repaid out of wages to be subsequently earned.

Whatever was formerly the effect of the customary understanding that large loans made to a head kankani were to be repaid out of wages, and that wages could legally be retained in payment of old advances, I think that customary understanding was corrected by the Ordinance I have quoted, which enacts that as a set-off to wages shall only be put advances made against wages, not (as I read the Ordinance) advances for bringing coolies and the like.

The Magistrate rests his judgment indeed entirely on the special agreement which he holds was made between the complainant and the accused. It is not necessary to decide now what the effect of that agreement would be in a civil case for wages. It surely has no effect in a criminal case. If this kankani is not liable to punishment under this Ordinance, he has not made himself liable by this agreement criminally.

His wages for November were not paid to him ; more than sixty days elapsed under the Ordinance ; he was not liable to punishment if he then left ; he did not render himself liable to punishment because he agreed with his employer that he might retain the wages in payment of a debt : that was an advantage to the employer, which I assume the employer might gain by, but the agreement cannot bring within the punitive clauses of the Labour Ordinance a man who is not liable to punishment if he had not made the agreement.

I am of opinion that the accused was wrongly convicted, and that he is entitled to an acquittal and discharge.

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* *Ante*, p. 42 of these reports.

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THE QUEEN *v.* FERNANDO *et al.*

P. C., Nuwara Eliya, 8,729.

Ordinance No. 10 of 1844 ss. 33 and 36—Neglect to grant permit for removal of arrack—Discretion of persons authorized to grant permit.

Under sections 33 and 36 of the Ordinance No. 10 of 1844, a licensed retail dealer in arrack is no more bound than the Government Agent is to grant a permit for the removal of arrack. They have a discretion to grant or withhold it according to circumstances.

The punishment provided in section 36 is in respect of those who attempt to exercise this discretion for reward or gratuity.

THE accused in this case, being licensed retail dealers in arrack, were prosecuted for having neglected to grant a permit for the removal of arrack, in breach of section 36 of Ordinance No. 10 of 1844. The second accused was convicted and sentenced to pay a fine of Rs. 50.

On the motion of his counsel, this judgment was brought in review before the Supreme Court.

Dornhorst, for appellant.

Templer (Acting Solicitor-General), for respondent.

Cur. adv. vult.

21st February, 1895. LAWRIE, A.C.J.—

This conviction under the 36th section of the Arrack Ordinance, No. 10 of 1844, came before me in review at the instance of the accused, who was fined Rs. 50 by the Police Magistrate of Nuwara Eliya.

The parties empowered by the 33rd clause to grant permits are (1) the Government Agent of the Province; (2) any person duly authorized in wiriting under the hand of the Government Agent; (3) any licensed retail dealer for removal within the limits of his district.

The learned Magistrate implies that every licensed retail dealer is bound to grant a permit whenever his customer asks for one. If the Legislature had meant to make that imperative and to punish every retail dealer who refused to give every purchaser a permit, it would have been easy to have so enacted, but I do not find that the duty is cast more on the vendor than on the Government Agent or on the persons appointed by him, or on any other licensed retail dealer. I think it is not an imperative duty thrown on these three classes of people, but a discretion given to them to be exercised or withheld according to circumstances. The Ordinance however provides a punishment for those who attempt

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to make this discretion an instrument of extortion. If they make the granting of a permit depend on payment to them of a fee, gratuity, or reward, they shall be punished.

It seems to me impossible to read the 33rd and 36th clauses as meaning that men can demand permits of removal, and that the man refusing is guilty of an offence merely if he refuses or neglects or delays to grant one. A Government Agent (and the same may be said of the other persons) may very reasonably say: "I know nothing about the applicant," or "I know him to be of doubtful "character, let him go to some one who knows him better, or who "is willing to take a responsibility which I am unwilling to take." Of course the position of the Government Agent would be very different if he were to say to the applicant, "My fee for granting "a permit is Rs. 2·50. You cannot get one from me until that "is paid."

For these reasons, the conviction is set aside and the accused is acquitted, there being no evidence that he demanded or suggested the payment to him of a fee, gratuity, or reward.

MUDIANSE KORALA *v.* APPUHAMY *et al.*

P. C., Kégalla, 12,519.

Civil Procedure Code, ss. 542 and 543—Prosecution for not reporting death—Duty of "next of kin"—Ordinance No. 18 of 1867, s. 18—Absence of fraud.

Where a deceased left property exceeding Rs. 1,000 and minor children, a prosecution for not reporting his death under section 543 of the Civil Procedure Code does not lie against the adult brothers of the deceased.

It is only when some fraud has been perpetrated that the provisions of sections 542 and 543 of the Civil Procedure Code should be enforced.

The best working provision regarding the reporting of deaths is to be found, not in section 542 of the Code, but in Ordinance No. 18 of 1867, section 18.

THIS purported to be a prosecution under section 543 of the Civil Procedure Code, it being alleged that one Punchirala died intestate on the 28th April, 1894, and that "he left no widow, "and left property exceeding Rs. 1,000 in value; and the above-"named accused being the brothers and next of kin of the deceased, "and bound as such under section 542 of the Civil Procedure Code, "within one month from the date of the death of the said Punchirala, "to report the cause to the District Court...... did wilfully "omit to report the said death," &c.

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On being asked to show cause why they should not be convicted, it was contended on behalf of the accused that, as the deceased had left him surviving minor children, they were his "next of kin," and not the accused, and that it was not the duty of the latter to report the death.

The Police Magistrate convicted the accused, and sentenced them to pay each a fine of Rs. 2·50.

On appeal, *Bawa* appeared for them.

4th September, 1894. LAWRIE, A.C.J., set aside the conviction and acquitted the accused, in the following judgment:—

When the accused were asked if they had any cause to show why they should not be convicted, their Proctor made a statement, which the Police Magistrate seems to have treated as a plea of guilty, because he then and there convicted. It is clear to me that the accused did not intend to plead guilty, and did not in fact plead guilty.

I would have sent the case back for trial, but that seems unnecessary, because I think I may take it to be admitted by the prosecution that the deceased left minor children, who are his next of kin. If that be so, then the brothers of the deceased are not his next of kin, and no duty is laid on them by section 542 of the Civil Procedure Code to report the death.

The best working provision regarding the reporting of deaths is to be found, not in section 542 of the Code, but in Ordinance No. 18 of 1867, section 18. By this Ordinance the duty of reporting a death is laid on the nearest male relation present at the death or attending the last illness, and in case none such be present, then the occupier of the house or some inmate of the house, &c. The person failing to report shall, by section 20, be liable to a fine not exceeding £5.

It is, I think, only when some fraud has been perpetrated with regard to an estate worth more than Rs. 1,000 that the provisions of sections 542 and 543 of the Code should be put in force.

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ANNAMALAY CHETTY *v.* GUNERATNE.

D. C., Negombo, 751.

Civil Procedure Code, s. 219—Order of Court upon judgment-debtor for attendance and examination—Disobedience of order—Liability of debtor to be punished for contempt of Court under chapter XVII. of Code.

Disobedience by a judgment-debtor of an order made under section 219 of the Civil Procedure Code to attend court for examination is not punishable as a contempt of Court under chapter XVII. of the Code.

THE defendant in this action, having received notice of an order made by the District Court of Negombo under section 219 of the Civil Procedure Code, requiring his attendance on a certain day for the purpose of being examined touching his means of satisfying the decree entered against him in the case, failed to comply with that order, and the plaintiff's Proctor moved that the Court do deal with him for contempt of Court under sections 137 and 141 of the Code.

The Court allowed summons against him, and on appearing he was called upon to show cause why he should not be punished for contempt of Court in that he failed to comply with its order requiring his attendance on a certain date. The defendant pleaded sudden illness which overtook him on his way to the Court and prevented his attendance.

The District Judge disbelieved this excuse, and found the defendant guilty of contempt of Court.

The defendant appealed.

Dornhorst, for appellant.

31st January, 1895. WITHERS, J.—

We are of opinion that this order cannot be supported.

In the first place, we are of opinion that an order under section 219 of the Civil Procedure Code cannot be made to relate back to the provisions under chapter 17. So far as this matter is concerned, chapter 17 refers to the attendance of witnesses and parties summoned to attend and give evidence in the cause. By the time we reach section 219 the cause is over, but, to assist in the execution of a judgment, a debtor may be ordered to appear and disclose any debts owing to him which may be reached in execution.

Now, it is noticeable that there is no provision in the Civil Procedure Code for punishing a judgment-debtor who does not appear in obedience to an order under section 219. Similar cases have been expressly provided for in other parts of the Code. Take for instance section 663, section 717, section 718, where disobedience

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of an injunction or a certain decree or order of the kind mentioned in those sections may be enforced by the punishment of the offender as for a contempt of Court. The civil Court's jurisdiction to deal with offences of contempt is limited to the provisions of section 59 of the Courts Ordinance, No. 1 of 1889, and to special provisions in the Civil Procedure Code. Section 59 enacts that a District Court may take cognizance of offences of contempt of Court committed in the presence of the Court itself, and of all offences which are committed in the course of any act or proceeding in the said Court, and which are declared by any law for the time being in force to be punishable as contempts of Court.

Now, as we observed before, disobedience of an order by a judgment-debtor of this kind is not made punishable as a contempt of Court. If an offence has been committed, recourse must be had to the Penal Code, assuming the judgment-debtor's conduct to be contrary to the penal provisions of that Code. The appeal succeeds. The conviction is set aside, and the accused is acquitted.

Bbowne, J.—

I agree, and wish to add, as a suggestion for consideration in future cases, whether the provisions of section 219 should be enforced in the first instance, as was done here, before issue of writ, without special grounds being made for the Court to allow it ; for if the writ were presented, the debtor might pay it, and there would be no need for the time of the Court to be occupied in the inquiry and the debtor to be put to the expense of attending. As District Judge, I required in a like case (3,934, D. C., Colombo) that plaintiff should make inquiry of the debtor living in Nuwara Eliya of what property he was possessed, ere he should be allowed to put the defendant to the cost of attendance.

Lawrie, A.C.J.—

I concur.

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MEIDEEN *v.* BANDA *et al.*

WALATAPPA CHETTY, Claimant.

D. C., Kurunégala, 792.

Civil Procedure Code, s. 18—Application to be made added party—Diversity of interest between plaintiff and applicant—Interpleader—Duty of Colonial Courts to follow decisions of Court of Appeal on Imperial Statutes, where such Statutes are identical with Colonial Statutes.

Section 18 of the Civil Procedure Code corresponds with the language of Rule 11, Order XVI., of the Supreme Court of England, and in the interpretation of that section effect must be given to the principle that, wherever a Court can see in the transactions brought before it that the rights of some of the parties may or will be probably affected, so that under the former system of law there might have been several actions brought in respect of the same transaction, the Court shall have power to bring all the parties before it and determine all their rights by one trial, in order that the cost of litigation may be diminished as much as possible.

If the interest of the person applying to be added party is adverse to and independent of the plaintiff's, the defendants might interplead and retire, leaving the deposit to be contested between the two rival claimants, or the applicant should be added a defendant, if added at all, and should put in a defence and counter-claim to the sum in deposit.

When the provisions of a Colonial Statute are identical with those of an English Statute, the Colonial Courts should follow the decisions of the Court of Appeal on the Imperial Statute.

IN this case the plaintiff sued the defendants to recover the sum of Rs. 456, said to be due by them upon their mortgage bond executed in favour of one Pakir Meideen, who by deed had assigned all his interest therein to the plaintiff.

Summons having been duly served on the defendants, the first and third defendants appeared, and produced to the Court a receipt for Rs. 120 purporting to be under the hands of Pakir Meideen, the obligee, and admitted their indebtedness as regards the balance.

On the same day, one Walatappa Chetty appeared and claimed the whole of the amount due on the mortgage bond sued upon, by right of purchase at a Fiscal's sale held in execution of a writ sued out against Pakir Meideen and another person, whereat the Fiscal sold all the right, title, and interest of Pakir Meideen in and to the said bond. The claimant prayed that his claim may be inquired into, that the deed of assignment upon which plaintiff rested his case may be declared null and void, and that the claimant may be held entitled to the amount payable on the mortgage bond. Filing this application supported by an affidavit, the applicant moved to be added as party plaintiff.

The District Judge postponed judgment as regards the first and third defendants to a day on which he desired the case to be fixed

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for *ex parte* trial as against the absent defendants, and he allowed applicant's motion also to stand over for that day with notice to plaintiff. On the 24th April, 1894, the District Judge entered decree *nisi* against all the defendants in favour of plaintiff for the amount claimed less Rs. 120, by consent against the first and third defendants and by default against the second and fourth defendants.

The applicant's motion to be made added plaintiff was disposed of when plaintiff moved (on the 4th June) that the decree *nisi* already entered be made absolute. The District Judge's order was as follows :—" After reading the application and affidavit of " Walatappa Chetty, I refuse to make the decree *nisi* absolute. I " am of opinion that the presence of Walatappa Chetty before the " Court is necessary, in order that all the questions in the action " may be completely and effectually settled. I direct, therefore, " under the 18th section of the Civil Procedure Code, that the name " of Walatappa Chetty be added as plaintiff."

On appeal against this order—

Sampayo, for plaintiff appellant.

Dornhorst, for applicant respondent.

Cur. adv. vult.

On the 31st January, 1895, the Supreme Court varied the order of the Court below, by allowing Walatappa Chetty to be added as a party defendant in the action.

WITHERS, J.—

In this action four persons are sued for a debt under a bond which has been assigned to the plaintiff by the obligee.

On the 8th of March, 1894, the day fixed in the summons for appearance and answer, the first and third defendants appeared and admitted their indebtedness under the bond in all but a sum of Rs. 120, which they said they had paid, and which plaintiff acknowledged he had received.

Notwithstanding service of summons, neither the second nor the fourth defendants appeared.

On that day, one Walatappa Chetty applied to the Court for an order to be added as party plaintiff in this action, on the ground that the bond debt of the defendants to the original obligee, one S. P. Pakir Meideen, had been duly assigned to him by the Fiscal after sale thereof in execution of a judgment against the said S. P. Pakir Meideen. The District Judge directed the applicant's Proctor to give the plaintiff notice of his claim and postponed adjudication in the case and in the matter of the application for one month, within which time the two defendants who had

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appeared undertook to deposit in Court the balance of what was due by them under the assigned bond. The journal entries show that, on the 9th of April following, none of the parties nor the applicant was present in person or by Proctor except the plaintiff, who was present by his Proctor.

Proceedings were adjourned to the 24th of April, on which day there was an *ex parte* trial of the action as against the second and fourth defendants. At the conclusion of the trial, a decree *nisi* was entered for the plaintiff against these parties. Notice of this decree was issued, returnable the 21st of May.

On that day, according to the minutes, the second and fourth defendants failed to appear to show cause against the decree *nisi* being made absolute. On that day, too, the plaintiff and the applicant were present by their respective Proctors, and according to the minutes it would appear that the applicant had caused notice of his application to be served not only on the plaintiff as directed, but also, and very properly, on the four defendants in this action, and further on the parties, including the said S. P. Pakir Meideen, against whom he had obtained the judgment in execution of which the bond debt had been seized and sold and purchased by the applicant.

The case was not taken up that day, but adjourned to the 4th June following.

In the meantime, on the 29th of May, the applicant, with the consent of plaintiff's Proctor, moved to file an additional list of documents and witnesses, and this motion was allowed.

On the 4th of June, plaintiff's Proctor moved the Court to make the decree *nisi* against the second and fourth defendants absolute, and besides doing that, this Proctor, without any distinct motion addressed to the subject, contended "that the applicant had no "*locus standi* as regards this action in its present stage."

Thereupon the District Judge made the order appealed from, and it runs as follows:—

"After reading the application and affidavit of Walatappa "Chetty, I refuse to make the decree *nisi* absolute. I am of "opinion that the presence of Walatappa Chetty before the Court "is necessary, in order that all the questions in the action may be "completely and effectually settled. I direct, therefore, under the "18th section of the Civil Procedure Code, that the name of Wala-"tappa Chetty be added as plaintiff."

Such are the facts of the case, and the question for us to decide is, whether the applicant should be added as a party under the 18th section of our Civil Procedure Code. As it cannot be urged for a moment that the name of the applicant ought

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to have been originally joined as plaintiff or defendant, the only question is,—Is the applicant one whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action?

Now, the language of the 18th section of our Civil Procedure Code corresponds with the language of Rule 11, Order XVI., of the Supreme Court of England, and this being so, I take it that on principle we are bound to follow the decisions of the High Court of Appeal on questions arising out of the rules of the Supreme Court in England, conformably to the judgment of my Lords of the Privy Council in the case of *Trimble v. Hill*, reported in *49 L. J., Privy Council, p. 49*. The head-note of it is: "Where "the provisions of a Colonial Statute are identical with those "of an English Statute, the Colonial Courts should follow the "decisions of the Court of Appeal on the Imperial Statute." I therefore propose to take for my guidance in this matter the introductory part of the judgment of my Lord Esher, M.R., in the case of *Byrne v. Brown*, reported in *58 L. J., Queen's Bench, p. 411*. His lordship observes:—

"It seems to me to be the fundamental principle and one of the "chief objects of the Judicature Acts that, wherever a Court can "see in the transaction brought before it that the rights of some "of the parties may, or probably will, be affected, so that under the "former system of law there might have been several actions "brought in respect of the same transation, the Court shall have "power to bring all the parties before it and determine all their "rights by one trial.

"The evidence on the issues raised by new parties being brought "in need not be exactly the same. It will be enough if the main "part of the evidence or of the inquiry will be the same, and the "Court has power to bring all the parties before it and to determine "the matter in one action.

"Another great principle of the Judicature Acts was to diminish, "if possible, the cost of litigation. The Court ought, therefore, "to construe these Acts as largely as it can, in order to carry "out, as far as possible, those objects to which I have referred."

Applying these principles to this case, can it be said that thi case is touched by them?

It is clear that the plaintiff and the applicant have no community of interest, and that there can be no trial as to what share in the chose of action each is entitled to. Their claims are adverse and independent of each other: one claims as the assignee of Meideen *volens*, the other as an assign in law of Meideen *invitus*.

I assume that this is a case where the defendants might have

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interpleaded and retired from the field, leaving their deposit to be contested between the two rival claimants.

The defendants, however, have not taken this course, and they have raised no objections to the intervention of Walatappa.

I can find no precedent of a case in the English Courts where a person who might have been brought into Court on an interpleader has been added as a party at his own instance.

In a note at page 416 of *O'Kinealy* on the Indian Civil Procedure Code (3rd edition), it is said, "When a suit has been brought "against a person before instituting the interpleader suit, he "should endeavour to have the other claimants made parties under "section 32" [which corresponds to the section of our Code now in question], "so as to have the whole question disposed of in the one "suit." The author, as far as I can discover, cites no authority in support of this proposition; on the contrary, he refers to certain Indian cases which in his eyes appear to militate against it.

Reverting, however, to the principles laid down by the Master of the Rolls, it seems to me that the main part of the inquiry into defendant's obligation will be whether Meideen had any interest in this chose of action at the time he purported to assign it to the plaintiff, or had power then to dispose of it. If he had, plaintiff will be entitled to judgment. If he had not, and if the applicant had duly acquired it at a judicial auction, the latter will be entitled to the deposit.

The cause of action, viz., defendants' indebtedness on the bond, is common to both plaintiff and the applicant, and the question at issue will be, Who has the better title to recover this debt? The judgment will bind them once and for all.

The order cannot of course stand as it is. The numerous cases cited at page 366 of the *Annual Practice, 1894*, go to show that if a person not a party seeks to intervene under Rule 11, Order XVI., he should apply to be made a defendant, and state the relief which he seeks. The applicant here should be added as a defendant, if added at all, and should put in a defence and a counter-claim to the sum in deposit.

I have been much exercised by this question, but the conclusion I come to is that the applicant, Walatappa, should be allowed to be added as a party defendant in this action, and I would so decree.

BROWNE, J.—

When first and third defendants were served with the summons in this action they appeared and produced a receipt to them by plaintiff for a part payment of Rs. 120 which plaintiff admitted, and, says the record, "admit that they owe the balance on the

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bond, but a Chetty has told them not to pay plaintiff." The next moment thereafter Mr. Modder filed a proxy of Walatappa Chetty, and applied that his client be added as party plaintiff. He filed affidavit of Walatappa having acquired the original obligee's right, title, and interest by purchase, and declined to admit the receipt produced. The defendants present undertook to deposit the balance which the Court officer should compute to be due.

It does not appear that this computation was ever made, or that these defendants were ever required to deposit any sum.

Had defendants been the party applying for an order to join the applicant as an added party, it would have been necessary that the deposit should have been made forthwith ere the matter proceeded further; but as the application was by the would-be added party, the order had not to be enforced unless the application were ultimately allowed, which, pending the result of this appeal, has not yet occurred. All that has since been done has been to enter a decree *nisi* against the other defendants and to discuss Walatappa's application on notice to the plaintiff. After such discussion the learned District Judge made order allowing it, and plaintiff has appealed.

I agree in the view of my brother Withers, and for the reasons given by him, that the order of the learned District Judge should be affirmed as directed by him. I would, however, have suggested that in view of the special provision made in the second paragraph of section 18 of our Code, Walatappa Chetty should be designated "added party" only, without its being stated that he is added as a plaintiff or defendant. This provision is not to be found in section 32 of the Indian Civil Procedure Code, or in Order XVI., Rule 11, of the Judicature Rules of 1883. In effect it would keep this new party in the suit always and entirely distinguished from the original parties so as to avoid confusion of him with either or any of them or their rights or claims. As, however, the rest of the Court affirm the order in this respect I will not dissent therefrom, so that the practice may be settled.

In both the Indian and our own Code, the provisions and subjects of section 18 (Indian, 32) were kept in view when permitting interpleader procedure by section 628 (Indian, 470), when it was there provided that, if any action is pending in which the rights of all parties can properly be decided, an interpleader action should not be instituted, and I presume it is this proviso which is the authority for O'Kinealy's dictum quoted by my brother Withers. Of course, as the writer is careful by reference to certain decisions to remind his reader, there is no provision in the Indian (nor the Ceylon) Code similar to that in the Judicature Rules (1883),

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Order XVI., Rule 48, whereby a defendant may obtain leave to have joined one against whom he claims to be entitled to contribution or indemnity—the rule whereunder were made the orders in the *Swansea Shipping Company's case* (*1 L.R., Q.B. 644*) and *Bower v. Hartley* (*ib. 652*) cited by Mr. Dornhorst in argument. Once the applicant notified to them his claim, thereafter promptly appeared in Court and repeated it there, the position of affairs more closely resembled that in *Reading v. School Board for London* (*16 L.R., Q.B. 686*), where defendants, with notice of assignment to claimant by plaintiff of the moneys due him by them, moved and were allowed to interplead on payment of their debt, and issue was framed to determine the rights of the plaintiff and claimant.

It is to me clear that were it not for this procedure the defendant would be exposed to two actions on the bond, and that, if judgment went against him in both, he might either be damnified thereby by having to satisfy the double decree, or might possibly be driven to bring a third action if such a course were open to him. It is unreasonable to require him in two separate actions to plead the right or claim of the plaintiff in each suit to his trouble and costs, when by lodgment of his admitted debt in Court he stands absolved from all litigation.

LAWRIE, A.C.J.—

In this point of practice I wish to agree with the rest of the Court, but I cannot refrain from saying that I have difficulty in seeing what right Walatappa Chetty has to interfere in this action.

Having, as he alleges, a complete and preferable right as creditor in this bond, he can bring action on it whenever he likes. He has not yet done so. The plaintiff (who also alleges a complete and preferable right) was more prompt; he lost no time in bringing action against the debtors; these debtors have not contested the plaintiff's right nor their liability to him; indeed they paid part of the debt before action. Between the parties to this action there is no contest; no question has to be tried.

I doubt whether there are here the conditions required by Lord Esher, for in this action there would be no evidence and no inquiry if Walatappa Chetty's application be refused. If Walatappa Chetty be added as defendant, there must be new pleadings. What cause of action the plaintiff can allege against Walatappa I do not know.

I would prefer to leave the parties to bring their actions in their own way; the defendants seem to be willing that the plaintiff should get judgment against them; why should the Court interfere to help Walatappa Chetty, who has abstained from bringing an action, or to help the defendants, who have not asked for help?

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MACK *v.* TAMBI LEBBE *et al.*

P. C., Batticaloa, 10,106.

Petroleum Ordinance, No. 6 of 1887, ss. 14, 20, and 37—Possessing or keeping petroleum—Proof of existence of a place licensed for storage of petroleum—Burden of proof as to exceptions.

A plaint alleging that the defendants possessed in their premises petroleum exceeding 50 gallons, contrary to section 14 of the Ordinance No. 6 of 1887, and thus became punishable under section 20, is not so bad as to make it wholly defective.

" Possessing " connotes " keeping."

The onus being on the accused to justify his keeping, it is not necessary under section 37 for a prosecutor to specify or negative in his plaint, or prove, any exception or exemption which does or does not accompany the description of offence.

In view of the rule made by the Governor in Council, that all petroleum landed in the Island should be carried at once to premises in respect of which a license has been granted, it is the duty of a person who desires to keep more than the permitted quantity, to provide himself with licensed premises, and it is not incumbent on the prosecutor to allege or prove the existence of a place which the Government can license for the storage of petroleum.

THE facts of the case appear in the judgment of the Supreme Court.

On appeal against a conviction, *Dornhorst* appeared for the accused appellant.

Dias, Crown Counsel, for complainant respondent.

21st February, 1895. WITHERS, J.—

The defendants on the 22nd day of December last were jointly charged, in a complaint laid before the Magistrate by a " local authority," in the sense of the term used in Ordinance No. 6 of 1887, as follows :—

" That the defendants did on the 17th day of December, 1894, " at Chapel street, Batticaloa, within the jurisdiction of this Court, " possess in their premises a quantity of petroleum, to wit, kerosine " oil, exceeding 50 gallons, contrary to the provisions of the Ordi- " nance No. 6 of 1887, clause 14, and thus became punishable under " section 20 of the said Ordinance."

The defendants were accordingly summoned to appear and answer this charge.

On the 29th of December last the defendants appeared before the Magistrate, who read and explained to the parties charged the particulars of the plaint. Thereupon the defendants admitted that they had more than 50 gallons of oil in store. They were

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accordingly sentenced to pay a nominal fine of 50 cents, the reason for their being dealt with so lightly being given in a judgment in a similar case tried and determined the same day.

From this sentence they appealed.

It was urged by Mr. Dornhorst that the appeal was taken on a point of law, the point being that the complaint contained no charge of any statutable or common law offence, and that a plea of guilty to an innocent act was no plea at all. The argument for the appellants was partly technical and partly meritorious—technical, in that "possessing" petroleum is no offence, but only "keeping" it, under the 14th section of the Code, and that it was not alleged that the prohibited quantity of petroleum was possessed without a license or in contravention of a license.

The next serious contention was that, before the appellants could be prosecuted under the 14th section of the Ordinance, it should be alleged and proved that there existed a place which the Government could license for the storage of petroleum, and he mentioned other conditions precedent indicated in the Ordinance, which it was for the prosecution to allege and prove, before the defendants could be called on to plead to the charge of the offence of keeping more than 50 gallons of petroleum without a license, or in breach of the terms of a license.

As to the technical point, I cannot rule that the defendants were prejudiced in any way by the language used in the plaint. Though "kept" would be a more apt word than "possess," and would be the proper word to use, because it is the very word used in the section in question, I cannot say that it is so bad as to make the plaint wholly defective. The framers of the Ordinance laxly used the word "possess" for the word "keep" in the very next section, the 15th, and it may be fairly argued therefrom that one word connotes the other.

Then the 37th section enacts that the exception, &c., though accompanying the description of the offence, need not be specified in the plaint, or proved if specified in it. The onus is laid from the first on the accused to justify his keeping at a certain place more than the permitted quantity of petroleum.

On the more serious point taken, I am also against Mr. Dornhorst.

In the *Government Gazette* of the 4th March, 1887, the Governor in Council caused it to be proclaimed that this Ordinance was to come in force throughout the Colony from and after the 1st of July, 1887.

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In the *Government Gazette* of the 9th August, 1887, certain rules were proclaimed by the Governor in Council (designated Petroleum Rules) to be observed throughout the Island, including the rule that " all petroleum landed in the Island should be carried " at once to .... to .... or to premises in respect " of which a license for the possession of petroleum has been " granted.

If a person wishes to keep more than the permitted quantity of petroleum for trade, it seems to me clear that he must take care to keep it in premises sufficiently safe for the purpose. He must put a place up for himself such as will satisfy the authority under the Ordinance who is competent to grant him a license for the keeping of more than 50 gallons of petroleum at a time. If he has no such premises, or neglects to put up such premises, he keeps the prohibited quantity at his risk.

The Ordinance expressly enacts in section 14 that no quantity of petroleum exceeding 50 gallons shall be kept by *any one* person (here the defendants are trading jointly as one person) or on the *same* premises (as here), except under a license from the local authority.

If no person has been appointed to issue licenses (see definition " local authority ") the Government should be asked to appoint one.

The 20th section enacts that any person who in *contravention of this Ordinance* or of any rules made hereunder possesses petroleum .... shall be punished with imprisonment, simple or rigorous, or a fine within certain limits.

It is therefore an offence to contravene the Ordinance. The defendants in fact admit they have contravened the Ordinance. They were properly sentenced. The judgment is right.

It need hardly be said that Government would not demand a storage fee for petroleum kept by a person on his own premises.

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ARUMUKHAM *et al.* *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY.

Re *ss.* *Chanda.*

Shipping—Sailing rules—Collision between steamer and sailing vessel—Fault of sailing vessel—Damages.

A schooner sailing in a direction of north-west by west sighted a white light on the port bow, which she mistook for the light of the Tuticorin lighthouse, and she made towards it. A few minutes afterward, noticing a red light, she concluded that a steamer was ahead, and put up a white light, porting her helm at the same time, which necessarily brought her across the course of the steamer.

The white light exhibited in the sailing vessel was observed in the steamer for a second or two and disappeared. The steamer held her course believing that the sailing vessel was pursuing a course parallel to hers, and that she would keep on in that course. In a few minutes the vessels collided and the schooner sank.

Held, that the schooner was materially in fault, and that if the steamer had left it to the last moment to take the proper measures for getting out of the way of the schooner, and had not acted with all the promptness which might have been expected under the circumstances, she too would have been in fault and liable to pay one-half of the damages caused.

But as the schooner did not carry the red and the green lights on her port and starboard sides, but held up a white light with as little prominence as possible, so that the steamer could not ascertain expeditiously what course the sailing vessel was taking, nor could get out of her course in due time, no fault could be attributed to the steamer upon which she can be made answerable for even half the damages sued for.

THIS action was raised before the Vice-Admiralty Court of the Island by the owners of a schooner called *Arumukham Sundaram* for the purpose of recovering compensation from the British India Steam Navigation Company, as owners of the ss. *Chanda,* for the loss of the schooner aforesaid, through being sunk after collision with the steamer, in consequence, it was alleged, of the negligence of the latter.

At the trial *Samuel Grenier* appeared for plaintiffs.

James van Langenberg (with him *R. Morgan*), for the defendants.

After evidence heard, the learned Judge, Sir JOHN BUDD PHEAR, reserved judgment.

On 15th October, 1878, he delivered judgment as follows :—

Notwithstanding the difficulty which was experienced at the trial on Saturday in effecting satisfactory translations of the evidence of the witnesses, I still think that the principal facts of the case are very clearly made out—much more so, indeed, than is usually the case in suits of this character. The foundation of

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the suit itself—namely, the collision between the two vessels and the loss of the *Arumukham Sundaram*—is beyond all dispute, and both sides pretty well agree in their account of the material facts of the occurrence. According to Abbas, the chief witness for the plaintiffs, those on board the schooner, about an hour after changing watch at midnight, sighted a white light about two miles right ahead of them. At first they took it to be the light of the Tuticorin lighthouse, and under this impression for a time they made towards it. When first discovered it was seen on the port bow. Five or six minutes afterward a red light was seen, and the witness immediately concluded that there was a steamer ahead. Then, according to his account, the course of the steamer was slightly altered by porting the helm. The red light continued to be seen on the port side until the collision took place. As soon as (four or five minutes after seeing the red light) Abbas perceived that there would be a collision, he called out again. The steamer struck the schooner nearly stem on, just abaft the main rigging. This witness (as well as all the others) says that as soon as the red light of the steamer was seen, the schooner put up a white light on the forestay. He also says that he never saw the hull of the steamer until he had perceived the red light. According to Cunjee Ahamadu Pulle, the man who was at that time at the wheel of the schooner, it was a quarter of an hour after Abbas first called out that he saw any light at all. This was a white light on the schooner's port bow. About ten minutes afterward he saw a red light in addition to the white light on the port bow. The light remained the whole time on the port bow, only it kept coming closer and closer. Next he saw the hull of the steamer. This was about ten minutes after he first perceived the red light, and then, he said, he ported his helm with the effect of changing the course of the schooner about two points, bringing her into a course heading north-west. At that time the steamer was, by his reckoning, about 150 fathoms off, and the collision almost immediately afterwards took place.

Now, if this account be accepted, the course of the schooner may be thus summarized. She was first sailing in a direction of north-west by west, but on the appearance of the white light, it being mistaken for a fixed light on shore, she made for it, perhaps without noticing the compass, and on the natural assumption that no change was made in the actual course of the schooner. Nevertheless, as the light she aimed at was moving instead of being fixed, the course the steamer was steering naturally changed with it. The witnesses, however, may be quite honest when they say that the schooner did not change her course. When they saw

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the red light they were certainly within the red quadrant of the steamer. Whether the red light was seen in fact on the port bow first or on the starboard bow first is comparatively immateria under these circumstances, because by the witnesses' own account the schooner was at that time making as straight as she could for the steamer, and therefore the angle could not have been very great one way or the other which the direction of the schooner's course was making with that of the steamer. And then the schooner ported her helm, which necessarily, as indeed it was intended to do, brought her across the course of the steamer ; and at this point it is important to bear in mind that by the account of plaintiffs' witnesses the white light was put up.

If we now turn to the evidence which Mr. Emery gives of the occurrence, we find him saying that he first saw the vessel under sail about two points on the starboard bow, apparently then about a mile from the steamer. But there was no light. He watched the schooner for two or three minutes from the middle of the starboard side of the bridge, and observed that it did not sensibly change its position. While he was so observing it, a white light was exhibited by the schooner, which after a second or two disappeared, and with it the schooner also. Mr. Emery tried to make out the schooner, notwithstanding that the light was gone, with the aid of binoculars, but could not detect it. He was not near enough to see her actual course, and he inferred that it must have been approximately parallel with that of the steamer. As a matter of fact, it has been seen that, if the schooner's own account of the matter be taken, she was then making straight for the steamer, and so Mr. Emery was not far wrong in the inference which he drew. He assumed that the vessel, whatever she was, and whatever her course might be, would keep on in the course which she then was upon ; and this he had a right to do, because the schooner was bound by law, with a certain exception that I may possibly presently allude to, to keep the course she was on, and to leave it to the steamer to get out of her way. For this purpose Mr. Emery starboarded his helm, and this also undoubtedly he had a perfect right to do, provided he succeeded in that way in avoiding the schooner. But unluckily the assumption of Mr. Emery was falsified by two circumstances. The first was that the inference, that the schooner was pursuing a certain definite course not remote from parallelism with his own was ill-founded. She was pursuing a varying course—a course varying with his own position, but such in effect as rendered her relatively fixed for the few moments he was observing her, and therefore justifying his inference. The second circumstance is

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that at the time Mr. Emery was drawing this inference and acting upon it, the schooner changed her course designedly by porting her helm and going across his bows. Just after this time the light re-appeared again, and then it was almost immediately under the steamer's bows. He ported his helm—the best thing probably he could do—but it was too late to avoid the collision that immediately ensued. The manœuvre probably had the effect, however, of putting the colliding point further aft than it would otherwise have been.

In the view which I have thus taken of the facts—a view in regard to which I have no hesitation at all upon the evidence before me—it is plain that the schooner was materially in fault in this matter, and that therefore it follows that at best she could only recover from the steamer one-half of the damage caused.

But I further think upon these facts that the steamer was not in fault. In the case of the *Velasquez*, which is reported in the *Law Reports, 1 Privy Council 494*, a question of this kind, almost precisely the same in its circumstances as the question arising in the present case, was considered and determined. The material parts of the judgment delivered by Sir James Colvile in that case are as follows :—

This is an appeal on the part of the owners of the Spanish steamer *Velasquez* against the sentence or decree of the High Court of Admiralty, which has pronounced that that vessel was in fault in running down the late barque called *The Star of Ceylon*, and has condemned the appellants and their bail in the damages proceeded for, and costs of suit.

The conflict of evidence is far less than generally occurs in cases of collision. The undisputed facts of the case are: that about half past seven on the evening of the 11th of October last, the steamer, being in charge of a licensed pilot, was proceeding up channel, steering north-east by north; whilst this barque was going down channel, heading south-west by south, and therefore on a course parallel to that of the steamer. The wind was east by south; each vessel was making about six knots an hour through the water; and the tide, which was against the steamer, was of course in favour of the barque. It is further admitted that at some time before the collision the steamer starboarded her helm, or at least executed a manœuvre which had the effect which starboarding a helm of the ordinary construction produces; and that the barque ported her helm. The result was a collision in which the barque, being struck on the port bow by the stem of the steamer, was sunk, her crew happily escaping on board of the steamer.

The case of the barque is thus stated: " The masthead light of the steamer was first seen at the distance of between three and four miles nearly ahead, but a little on the port bow of the barque her red or port light was subsequently made out in the same direction. She continued to approach the barque on her port bow, and in such a direction as to involve danger of a collision unless one of the vessels ported; and as no alteration was made in her course when the two vessels were so near that it was dangerous for the barque to keep on her course, the helm of the latter was ported. Very shortly after this has been done, and the vessels would otherwise have passed clear of each

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other, the steamship was noticed to be making towards the barque ; and as the only means of avoiding a collision, or lessening the effect thereof, the helm of the barque was put hard aport; but almost immediately afterwards the steamer, having shut in her red and opened her green light, ran stem on into the barque," &c. And the contention of the plaintiffs, the owners of the barque, was that the collision was attributable solely to the carelessness, negligence, and want of skill of those on board and in charge of the steamshop, more especially in their having omitted, either from want of a good look-out or otherwise, to take within sufficient time the proper measures to keep clear of the barque.

The defence on the part of the steamer raised the following case: "The barque was first seen at the distance of about three quarters of a mile from, and being from two to three points on the starboard bow of, the steamer, and with no light then visible on board the latter. The steamer starboarded by order of the pilot, and her head went off to port, and she kept out of the way of the barque; but the latter improperly deviated from her course, under a port helm, and exhibited a red light to those on board the steamer, and caused danger of collision; whereupon, by order of the pilot, the steamer hard a-starboarded and stopped her engines, but the barque, nevertheless, ran into, and with her port bow before the fore-rigging struck the steamer on her stem and starboard bow." And the contention of the defendants was that the collision was caused by the negligent and improper navigation of the barque. Another and distinct ground of defence is that, if the coll sion was in any way occasioned by any body on board the steamer, it was occasioned solely by the licensed pilot, whose orders in respect of her navigation were promptly and implicitly obeyed by her master and crew.

In the circumstance stated, it was the duty of the steamer to keep out of the way of the sailing vessel, and provided she did so effectually, she was at liberty to do it either by starboarding or by porting her helm. On the other hand, it was the duty of the barque to keep her course, and she could be excused for deviating from it only by showing that it was necessary to do so in order to avoid immediate danger.

At the close of the argument for the appellants their Lordships intimated their opinion that no ground had been made for disturbing this judgment, in so far as it found that as between the colliding vessels the steamer was solely in fault. The conclusions which they drew from the evidence were, that the vessels were meeting port side to port side; that the steamer took no steps to avoid the barque until the vessels were very near each other; and that in these circumstances the barque was justified in porting her helm when she did port it; whilst, on the other hand, the starboarding of the helm of the steamer when it took place was a dangerous and improper manœuvre, and the immediate cause of the collision.

Their Lordships of the Privy Council founded this conclusion mainly upon the inference which they drew from the evidence that, if there had been a proper look-out, not only would the barque have been descried at a greater distance, but her true position would have been known. It was in short held in this case that the *Velasquez* was to blame, because, although she was at liberty to get out of the way of the barque *Star of Ceylon*, either by starboarding or porting her helm, it was her duty to take measures for this purpose in sufficient time to practically get out of the way, and not leave it until so late a moment that there was risk of immediate collision.

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In the present instance, therefore, if I thought that the steamer had left it to the last moment to take the proper measures for getting out of the way of the schooner, and that it had not acted with all the promptness which might have been expected under the circumstances, then I ought to hold that she, too, was in fault; but it seems to me that there is no good ground why I should not accept Mr. Emery's account of the matter, and according to that, although he was on the watch and perceived the schooner in the first instance before any suggestion of a light proceeded from her, yet he had not been able to see her in time to take more effective measures than he did take. Had the schooner exhibited to him the lights which she was bound to carry, he would have seen at the first glance precisely what course she was pursuing, and he would probably have seen that she was coming down upon him stem on. At any rate, he would not have been obliged to wait for two or three minutes before he could ascertain what probably her real course and relative position was. Now, on this evidence, taken in connection with that of the plaintiffs' witnesses, I think I cannot avoid the conclusion that the schooner had not got her red or green lights shown. Mr. Emery says he did not see them at any time, and that he never saw any trace after the collision of their having previously been where they ought to have been. There were no broken lamps; in fact, there was nothing to indicate that these lights had existed, and although Abbas and the other witnesses called on the part of the plaintiffs say that the lights were burning before and up to the time of the collision, they all agree in saying that the moment they discovered the white light was not the shore light, but a steamer's light, they put up a white light on the forestay. Why did they do that, if they had the other lights properly burning? It was a distinct breach of the law for them to do so. The rule which obliges sailing vessels to carry the red and the green lights on their port and starboard sides respectively forbids them to carry any other light. I cannot say that I have the slightest doubt that there were no lights exhibited on the part of the schooner until the moment when she discovered that the steamer was approaching her, and that then the schooner's people held up as prominently as they could the white light taken from the cabin. If this be so, it was not the fault of Mr. Emery, but distinctly that of the schooner, that he was obliged to waste two or three minutes in watching the sailing vessel, and in endeavouring to form an opinion as to her course before he could take any steps to get out of her way. And how important those two or three or four minutes were can be seen at once when it is considered that at

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the rates of speed spoken to by the witnesses the two vessels must have been approaching each other at the relative velocity of at least some twelve miles an hour, which would need only five minutes to cover the whole space that Mr. Emery reckoned intervened between the steamer and the schooner when he first perceived the latter. The hypothesis by which Mr. Emery explained the temporary disappearance of both the schooner and her light was, that although the sky was clear there was considerable haze in places on the surface of the water. And this is supported by the schooner's own case that it was some time after the mast-head light of the steamer was first seen that her side lights came into view.

The conclusion, then, which I have arrived at on the whole of the case is that, while the schooner was materially in fault in the matter of this collision, there is no substantial fault attributable to the steamer upon which the latter can be made answerable for even half the damages sued for. The judgment of the Court must therefore be that the action be dismissed with costs.

Judgment accordingly.

SILVA *v.* GRERO.

D. C., Colombo, 5,601.

Civil Procedure Code, ss. 86 and 87—Appeal against decree absolute for default—"Appearance" in Court—Decree made absolute after appearance and showing of insufficient cause.

Held, per LAWRIE, A.C.J., and WITHERS, J. (BROWNE, J., *dissentiente*), that a decree *nisi* made absolute in the presence of a defendant, who appeared and attempted to show cause against it, is nevertheless a decree absolute for default, and hence not appealable.

Held, per LAWRIE, A.C.J., that the mere bodily presence of a defendant in court is not "appearance." It must be an appearance on the proper day, and if being absent on that day he comes into Court either personally or by Proctor on a later day, his non-appearance on the proper day must be accounted for, before the late coming can be accounted an "appearance" in the legal sense.

Held, per BROWNE, J. (*dissentiente*), that the term "appear" in sections 85–87 of the Civil Procedure Code means the first formal presentation of himself by the defendant to the Court in person or by proxy; and that "decree absolute for default" in section 87 means "for entire default of appearance prior to entry thereof."

D. C., Badulla, 370, *Natchiappa Chetty v. Muttu Kangany* (*2 C. L. R. 110*), considered and followed.

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IN this action, summons having been reported duly served on the defendant, and the defendant not having entered appearance on the returnable day, the case was heard *ex parte* in due course and decree *nisi* entered in favour of plaintiff. On the day fixed for making the decree absolute, defendant appeared by Proctor, and for reasons mentioned in his affidavit moved to have the decree *nisi* set aside, and to be allowed to file answer. After argument, the District Judge held that the defendant had not established his right to have the decree set aside on the ground of irregularity, and that he had failed to excuse his default. The decree *nisi* was made absolute against him.

The defendant appealed.

Van Langenberg, for plaintiff respondent, took the preliminary objection that an appeal did not lie, and cited *Natchiappa v. Muttu Kangany* (*2 C. L. R. 110*).

Pereira, for defendant appellant, submitted that the case cited deserved to be re-considered.

Their Lordships ordered the case to be listed for argument before the Collective Court.

Pereira, for defendant appellant. A decree absolute for default is a decree made absolute, in consequence of the default of a defendant to show cause against a decree *nisi*. Against such a decree absolute, the Code, section 87, enjoins there shall be no appeal. But the decree in the present case is not a decree absolute for default. The defendant appeared and showed cause against the decree *nisi* being made absolute; the plaintiff was heard *contra;* and the decree made absolute. That was an order *inter partes*, and the defendant could not move the Court below to set it aside. His only remedy was by appeal, and an appeal lay under section 75 of the Courts Ordinance. There is a distinction drawn in section 87 of the Code between a decree absolute for default and a decree absolute after cause shown. That section provides for the setting aside, on the motion of the defendant, of a decree absolute for default, by the very Court which passed such decree, and it also provides for an appeal from an order setting aside or refusing to set aside such decree. The decree absolute for default contemplated by the Code is therefore decree entered *ex parte*, but the present decree was entered after both parties were heard, and it was not therefore a decree absolute for default. If no appeal is allowed from a decree such as the present, a defendant who deliberately absents himself after service on him of notice of decree *nisi* would be in a better position than one who appears to

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such notice and shows cause. The latter will have no remedy against the Court's order making the decree absolute, while the former might move to set aside such order and appeal against a refusal of the Court to do so.

If the word default in section 87 referred to the original default for which the decree *nisi* was entered, then there would be the absurdity of every decree absolute being a decree absolute for default.

Van Langenberg, for plaintiff respondent, *contra*.

Cur. adv. vult.

28th February, 1895. LAWRIE, A.C.J.—

This is an appeal from a decree in these terms: "The decree " *nisi* coming on for final order before . . the District Judge of " Colombo, on the 12th day of June, 1894, being the day appointed " to show cause against it, of which decree the defendant received " notice, as appears by the affidavit of . . , server, dated " 2nd June, 1894, and the plaintiff, appearing by his Proctor, and " the defendant, and no cause being shown to the contrary, the " decree *nisi* is made absolute."

Is it possible to read this decree otherwise than as a decree absolute for default? If it be a decree absolute for default, then the Code is explicit no appeal shall lie.

If I understand the argument of the appellant aright, he contends that the fact of the appearance of the defendant in the District Court, mentioned in the decree, showed that it was not a decree absolute for default, but that it was a final decree *inter partes*, against which an appeal lies.

If that be the argument of the appellant, I am against him.

It seems to me that the mere bodily presence of a defendant in court is not an appearance.

It must be an appearance on the proper day, and if being absent on that proper day he comes to Court either personally or by Proctor on a later day, his non-appearance on the proper day must be accounted for before the late coming can be accounted an appearance in the legal sense.

The defendant in the present case was in Court, but he did not "appear" on the day when the decree under appeal was pronounced. If on that day he tried to be heard, if he presented affidavits, if he tendered proof, the decree is silent; but the record shows that he made an attempt to show that his default to appear on the proper day was reasonable, but the same record shows that the Court held these reasons to be unreasonable; the District Judge

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treated the coming to Court as no appearance ; he made the decree *nisi* absolute—why ? Because the defendant was in default.

Therefore it seems to me that it is impossible to treat this decree otherwise than as a decree absolute for default, against which no appeal lies. I am unable to draw a distinction between this case and that reported in *2 Ceylon Law Reports, 110*. It is indeed admitted that the facts are the same, but that was decided by my brother Withers and me, whereas this comes before a Full Court, and we were ready to re-consider the point. As I gave a silent concurrence with my brother on the former occasion, it is right that I should give my reasons now.

Dealing then with this appeal as against the decree of the 12th June, I am of the opinion that that was on a decree absolute for default, and that no appeal lies.

I am not sure that an appeal would not lie against a District Judge's finding that the cause shown was not reasonable. If the Judge had first adjudicated on the grounds stated and supported by the defendant, and had distinctly and separately found that these were unreasonable, and ordered that a decree be entered, I am not sure that an appeal would not lie against that finding and order. I reserve my judgment, should an appeal from such a finding or order come before me. An appeal might lie, but it is not likely that the Appellate Court would upset the decision of the District Court. Unfortunately in cases where a defendant has merely to show reasonable grounds for his default, he usually states grounds which are abundantly reasonable, but which on investigation turn out to be untrue ; I think the discretion given to the Judge to adjudicate on the reasonableness and truthfulness of cause shown can safely be left with him.

I am for rejecting this appeal, as an appeal from a decree absolute for default. I adhere to the judgment in the case reported in the second volume of the *Ceylon Law Reports, 110*.

Withers, J.—

I quite feel the force of Mr. W. Pereira's argument that the Civil Procedure Code in the 86th and 87th sections passes over the case of an order *nisi* made absolute in the presence of the party who has appeared to show cause against the order *nisi* for default being made absolute, and leaves it to be regulated by the 75th section of Ordinance No. 1 of 1889, which enacts that " subject to the provisions " in that behalf in the Criminal Procedure Code or any Ordinance " amending the same, provided any party who shall be dissatisfied " with any judgment, decree, or order pronounced by a District

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" Court, may (excepting when such right is expressly disallowed) " appeal to the Supreme Court against any such judgment, decree, or " order, &c., from any error in law or in fact committed by such " Court," &c., but I am confronted by the words " no appeal shall lie against any decree *nisi* or absolute for default," which form the first sentence of the 87th section of the Civil Procedure Code. They expressly disallow an appeal from any decree *nisi* or absolute for default.

It cannot be denied that an order *nisi* made absolute for default is none the less a decree absolute for default because it has been made after hearing cause shown by the party in default.

The default is the ground both of the order and the decree.

No doubt that the 87th section goes on to say that, in the event of a decree being made absolute in the absence of a party who has or should have had notice of the order *nisi*, the party aggrieved may apply to have the decree set aside for the grounds assigned in the section, and that either party may appeal from the final order on that application. But this is the only relaxation of the provision that " no appeal shall lie against any decree *nisi* or absolute for default." So I still understand the provision of this section, and I abide by my former opinion in the case of *Nachippa Chetty v. Muttoo Kangani*, reported in *2 Ceylon Law Reports, 110*.

Thus the preliminary objection of Mr. Van Langenberg succeeds, and the appeal must be dismissed.

BROWNE, J.—

I am free to consider and take part in the decision of the preliminary objection raised for the respondent that no appeal lies from the order which, as District Judge, I made in this action on the 12th June last, for the question of right to appeal could not have been, and never was raised before me. And I have the greater satisfaction in holding, as I am prepared to do, that the objection is untenable, in that thereby it is made possible to have my order considered in appeal. Defendant failed to appear to summons, and I heard the case *ex parte*, receiving plaintiff's evidence, and entered decree *nisi*. When plaintiff moved to make it absolute, Mr. Perera for defendant sought both to satisfy me that there had been reasonable ground for default, and to show grounds why plaintiff, on the material before the Court, was not entitled to have decree entered in his favour. Over-ruling his objection I made the decree absolute, and from my decision he claims to have right to appeal, desiring to have reconsidered the decision of this Court in *370, D. C., Badulla* (*2 Ceylon Law Reports*,

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110), which is quite in point, pronounced by the other members of this Court, who have acceded to his desire.

The view I take I base upon the use of the term "appear" in sections 85 to 87, which I take to mean the first formal presentation of himself by the defendant to the Court in person or by proxy. Section 86 is clearly to be divided into two parts, according as to whether the defendant does or does not appear upon service of the decree *nisi*, and I would construe it and section 87 as if they were thus written :—

86 If having appeared to the notice defendant shall fail to satisfy the court, &c., then the court shall make the decree absolute, &c., as is in this Ordinance provided. If, however, the defendant shall satisfy the court there were reasonable grounds, &c., the court shall set aside the decree, &c., as the court shall deem fit.

87 (*a*) If the defendant does not appear on the day appointed in the decree *nisi* for showing cause, and if the court is satisfied that notice of the decree has been duly served, then the court shall make the decree absolute, &c., Ordinance hereinafter provided.

(*b*) No appeal shall lie against any decree *nisi* or absolute for default, but if any defendant against whom a decree absolute for default shall have been passed shall within a reasonable time appear and satisfy the court, &c., the court may set aside the decree or refuse to do so, which order shall be liable to appeal.

A defendant, I take it, cannot ordinarily "appear" twice in an action. Hence the provisions of the present section 87 apply only to the case when he first appears after decree absolute entered, and show that the "decree absolute for default" in its first line means "for entire default of appearance prior to entry thereof." When he appears upon service of decree *nisi*, and fails to obtain grace, the order made is one *inter partes*, and the court would not allow him to appear again under section 87 and re-discuss its previous ruling. Hence no special provision has been made to enable him to challenge the ruling of the Court other than the ordinary procedure of appeal.

He is surely entitled to it. If he delayed to appear till after decree absolute were entered, and then appeared and was unsuccessful, section 87 gives him a procedure whereby he can win a right of appeal therefrom. Why then, when he comes earlier into Court, should he be more hardly treated by being refused any appeal at all from an order like the present? For, as I have said, the Court would not allow him to re-appear and re-argue under section 87, and thereby win an entrance through the gate of appeal which a greater defaulter has provided for him.

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Dividing the sections as I have done, I would hold that my section 86 is entitled to be supplemented by the ordinary appeal right in section 75 of the Courts Ordinance and procedure, my section 87 (*a*) being specially supplemented by the provisions in it enabling appeal.

I would therefore hold that the defendant is entitled to have this appeal heard.

ALAWATUGODA RATEMAHATMEYA *v.* KIRIWANTE.

P. C., Nuwara Eliya, 8,926.

Forest Ordinance, No. 10 of 1885, chapter IV.—Prosecution under rules of 3rd February, 1887—Proof in such cases—Validity of judgment —Criminal Procedure Code, s. 372.

In a prosecution for clearing (for chena cultivation) a land at the disposal of the Crown without a permit, in breach of a rule framed under chapter IV. of the Ordinance No. 10 of 1885, it is necessary to prove that the land is not one within a reserved or village forest; that it is at the disposal of the Crown; that it is a chena; that its extent and boundaries are so and so; and that the accused cleared it.

A judgment of a criminal court should specify the offence with which the accused is charged, in terms of section 372 of the Criminal Procedure Code.

THE charge against the accused in this case was that he cleared for chena cultivation a land known as Komarikagalgawahena (situated at Thenpila in Walapane), at the disposal of the Crown, without a permit from the Government Agent or Assistant Government Agent within whose jurisdiction the land was situated, in breach of clause 1 of the rules dated 3rd February, 1887, framed under chapter IV. of Ordinance No. 10 of 1885, and the Police Magistrate, after evidence heard, delivered judgment as follows: "This is Crown land under the Ordinance 12 of 1840. Defendant "is convicted and fined two rupees and fifty cents."

On appeal (taken with leave of the Court below), *Wendt* appeared for accused appellant.

The Supreme Court quashed the conviction and remitted the case for further evidence.

19th March, 1895. WITHERS, J.—

The accused has been sentenced to pay a fine of Rs. 2·50, but the judgment which precedes the sentence is defective for this, if for no other, reason, that it does not specify the offence in the mode required by section 372 of the Criminal Procedure Code.

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But I will assume that the offence is the breach of a rule passed on the 3rd February, 1887, in conformity with the provisions of the 4th chapter of Ordinance No. 10 of 1885, which forbids clearing for chena cultivation land at the disposal of the Crown without a permit, and that in violation of that rule the accused on some day in September, 1894, cleared for chena cultivation without a permit a land of three kurunies in extent, known as Komarikagalgawahena, situated at Thenpila in Walapane.

Can this conviction be supported? The Magistrate has given the accused leave to appeal from this judgment, and so I have jurisdiction to entertain the appeal. I do not know how the accused came to obtain the leave of the Court to appeal. I can only suppose that the Magistrate felt some doubt about the correctness of his decision.

Unfortunately there is not sufficient material to enable me to determine whether the accused is innocent or guilty of the offence laid to his charge. In the first place, no one testifies that the accused did, as a matter of fact, clear the land above mentioned for chena cultivation. In the second place, there is no evidence that this land is not within a reserved or village forest; and as these rules can only relate to land at the Crown's disposal other than that included in a reserved or village forest, this fact, if it be a fact, is one necessary to be established by the prosecution. Then, there is not sufficient material for me to determine whether the said land is at the disposal of the Crown. I should like to know something more about the situation of this little patch of ground, for, according to the complaint, the so-called *hena* is only three kurunies in extent. If this is a mistake of mine, and if the extent relates to the extent cleared, then I should like to know what the entire extent of the land Komarikagalgawahena is. It does not follow that every patch of ground in the Island which has forest trees on it, or is waste, or is unoccupied or uncultivated, is presumed to be the property of the Crown. Again, this parcel of land is not said to be a chena, though bearing the name of Komarikagalgawahena, nor is it shown to be land which can only be cultivated after intervals of several years.

The one witness for the prosecution deposes that it is covered with lantana scrub. Why should not that be cultivated every year? The one witness further deposes that the land has no boundaries. I cannot conceive such a state of things. It must have some boundaries, or at least be surrounded on all four sides by something distinguishable from itself—path, river, road, field, or something.

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If it is contained within a larger area of Crown land, what are the boundaries of that land? If a piece of Crown land has no boundaries, boundary marks, or clearly defined limits of some kind, how is a person to know whether he is inside or outside of a piece of Crown land? Can a purely forest offence be imputed to a man, if he cannot know whether he is acting outside or inside a land at the disposal of the Crown?

The inquiry into this alleged offence errs on the side of compendious packing. I therefore quash the conviction and remit the case for further inquiry into the points indicated, and I trust that the judgment will be in accordance with the 372nd section of the Criminal Procedure Code.

REGINA *v.* CHARLES DIAS.

Mátara Criminal Sessions, No. 2.

Evidence—Dying declaration of person whose death was not the subject of inquiry at the trial—Its admissibility under s. 466 of the Criminal Procedure Code and under the common law.

A statement made by a dying man before an Inquirer into Deaths is not receivable in evidence under section 466 of the Criminal Procedure Code, not having been made on oath or affirmation, nor taken down by a Police Magistrate.

Per Bonser, C.J.—The declarat on of a dying person whose death did not form the subject of inquiry at the trial is not admissible without proof that the declarant was in actual danger of death and had given up all hope of recovery, and that the deaths of the declarant and the person whose death was being investigated were all due to one and the same transaction.

THE accused in this case was convicted of murder at a Criminal Sessions of the Supreme Court held at Mátara in May last, and a question of law was reserved by the presiding Commissioner of Assize and referred to the Supreme Court for decision under section 424 of the Criminal Procedure Code.

Two murders, consequent upon a land dispute, had been committed almost simultaneously and in the same place at Dikwella on the 17th of December, 1894: one by Dias, who killed Andris; the other by Gregoris, who killed Tilloris. A desultory fighting was maintained, after the two murders had taken place, between the trespassing party and some of the party of the deceased

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persons, who were brothers. One Andrias, a brother of Dias, while fighting with a brother of the two murdered men, received a gun-shot wound and died. It appeared that some time before his death he made a dying declaration to the effect that he killed both Dias and Gregoris.

In the case against Dias, the alleged dying declaration of Andrias was attempted to be given in evidence. The Commissioner of Assize disallowed the question put in that behalf to a witness for the defence, and the jury returned a verdict of guilty against the accused. The learned Commissioner thereupon referred the following case for the decision of two or more Judges of the Supreme Court :—

Case Reserved.

I have the honour to refer to the Hon. the Supreme Court the following questions which arose at the trial of the above-named accused on the 15th instant, for the murder of one Don Andris Kumaratunga by stabbing.

The case for the prosecution on the evidence was that accused and twenty-five to fifty others committed criminal trespass on a cocoanut garden in the possession or occupation of deceased Andris and his brother Tilloris; that these latter ran from 150 yards off to protect their property, and a fight ensued between them and the trespassers in a kurakkan enclosure; that Tilloris was beaten and fell, and, when rising, was stabbed by one Grigoris (who was convicted of such murder on the day previous to this trial); that Andris, deceased, thereupon ran from the enclosure into an adjoining field, and was chased by the accused and two others of the trespassers, was beaten and fell on his face, and was then stabbed in the back by the accused; and that immediately thereafter as Andrias, another of the trespassers, was fighting with Mendris (a brother of the two men already stabbed), he (Andrias) was killed by a gun-shot wound.

The defence called two witnesses, who deposed that after plucking nuts in the enclosure by lawful right they were menaced and went to the field; that there the deceased brothers Tilloris and Andris attacked Andrias, and that Andrias, in self-defence, drew his knife and, as Andris turned from it, he (Andrias) stabbed him (Andris) in the back first of all, and then stabbed Tilloris, who jumped into the enclosure, after which a shot was fired and Andrias fell wounded.

In addition to these witnesses the following witness was examined. To quote my notes :—

Francis de Silva Abeywardena sworn.

I am Mudaliyár of Wellaboda pattu and Inquirer into Deaths. I know Kadjugaha Koratuwa. I went there on 17th December. I saw Andrias on the road lying on a cot. He is a son of the Veda Arachchi. He was suffering from gun-shot wounds, and appeared to be in great pain. He died about three hours after I saw him. Before his death I spoke to him. He made a statement as to who injured him, and whom he injured.

Mr. Pereira proposes to ask this witness what statement the dying man made.

I disallow it, since the statement was not made and recorded in accordance with the provisions of section 466 of the Criminal Procedured Code.

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The accused was convicted and sentenced to death, execution of sentence being respited for a month. In view of this necessary respite, and although I did not at the trial expressly reserve the question for the decision of the Supreme Court, I would desire to be permitted to refer for their decision or review the question, whether or not the statement made to the Inquirer by Andrias should have been admitted by me in evidence, so that the conviction, if thereby improperly obtained, may be quashed. I desire this entirely by reason of the sentence and punishment which follows upon the conviction, and not because I myself doubt that my rejection of it was correct.

For, so far as I can see by the text books before me, "the deceased"—whose dying declarations are admissible upon the principles laid down in *R. v. Mead, 2 B. & C. 605*, and *R. v. Hind, 29 L. J. M. C. 148* (called "the party" in *R. v. Hutchinson, 2 B. & C. 408*), as cited in *Roscoe*, 11th edition, *32*, and *3 Russell, 267/8*—is the person whose death is the subject of inquiry. I do not find in the text books any case anent the dying declaration of any person other than such "deceased subject of inquiry" being admitted in evidence, except in one instance. The case of *R. v. Baker, 2 M. & Rob. 53*, where an inquiry into the death of a man poisoned by eating a cake made by his maid, who had also eaten of it and was poisoned; her dying declaration was received, on the ground that it was all one transaction. Roscoe (*p. 32*) cites this ruling, but at once refers to *R. v. Hind* and *R. v. Hutchinson* in such a manner as to imply that this admission of the declaration of one not the "deceased subject of inquiry" was contrary to that rule.

And can it be said here that the death of Andrias by a gun-shot wound from some other hand was "one and the same transaction" as the prior death of Andris? In *R. v. Baker* the cause of death was the same, the poisoned cake; but not so here. The decision in *R. v. Baker* must have been passed before the Statute 30 and 31 Vic., c. 35, § 6, was enacted, from which section 466 of our Criminal Procedure Code is taken, and under the operation of it I would submit for consideration whether Andrias was not truly a witness within its purview. Had he not been injured and died, that would have been his position; and if at any time between Andris's death and the trial he had sickened to the danger of his life, his examination could only have been taken as section 466 directs, after notice in writing (*R. v. Shurmer, 17 Q. B. D. 323*) to the accused.

Will the fact that he met his death at the same time and place (only, for his death was not due to the same cause) as the deceased subject Andris, permit his dying declaration to be received? It might be urged that the apprehension of death had not been proved ere the witness was asked to narrate the statement, and my rejection of the testimony might be supported thereon. But I would even presume the intended statement would include an assertion of that apprehension, and that it was yet open to me to inquire into the state of illness, &c. (*3 Russ. 266*).

I would therefore humbly submit for the consideration of the Hon. the Supreme Court, whether, if it had been proved that Andrias was under due apprehension of death, his dying declaration should have been admitted in evidence by me, and ask that, if necessary, order may be made under section 425 of the Criminal Procedure Code.

DODWELL F. BROWNE,
Commissioner of Assize.

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Walter Pereira appeared for the prisoner. The Commissioner of Assize disallowed the evidence simply because the statement of the deceased was not made and recorded in accordance with the provisions of section 466 of the Criminal Procedure Code. That section merely gives power to Police Magistrates to take evidence beforehand of persons lying dangerously ill, with a view to perpetuate their testimony to be used at the trial, but the section was not intended to abrogate or modify the general law of evidence as to the admissibility of dying declarations. The general rule as to dying declarations is, no doubt, that such declarations, though made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declarations ; but I rely on the ruling of the Court in *R. v. Baker, 2 M. & Rob. 53*, where the dying declarations of a person other than the deceased for whose murder the prisoner was being tried was admitted in evidence on the ground that the declarant himself met with his death and the declaration was made in the course, so to say, of the " same transaction " as that in which the deceased whose death was being inquired into was killed. In the present case, Andrias met with his death in the same general fight as that in which Tilloris and Andris were stabbed, and it is as to who stabbed these two that the declaration in question is said to have been made.

Rámanáthan, S.-G., submitted *R. v. Baker* was a solitary decision, which did not appear to rest on sound principle, and which was thought by the Judge who pronounced the ruling to be deserving of the consideration and adjudication of a higher tribunal. Even if that decision were accepted, the dying declaration of Andrias was inadmissible, as it was not shown that it was made under a settled hopeless expectation of death (*Queen v. Jenkins, 1 L. R. C. C. 187*). Nor did section 466 of the Criminal Procedure Code apply, as the statement was made before the Inquirer into Deaths, and not before the Police Magistrate. Under any circumstance, the case reserved by the Commissioner was an hypothetical case, and did not really " arise in the course of the trial " as provided in section 424 of the Criminal Procedure Code. The questions submitted were improperly before the Supreme Court, for want of evidence that Andrias was under a settled hopeless expectation of death.

Pereira, in reply.

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28th May, 1895. BONSER, C.J.—

The question which has been reserved for the consideration of this Court by the learned Commissioner of Assize is this—" Whether, " if it had been proved that Andrias was under due apprehension " of death, his dying declaration should have been admitted in " evidence." The Solicitor-General called attention to the fact that this is an hypothetical question, and that therefore it was not a question which arose in the course of the trial, and is not such a question as this Court can be called upon to answer. I agree with him that this is so ; but at the same time, considering that the matter is one of life or death to the accused, I think it right that we should express an opinion on the case.

What occurred at the trial was this. The counsel for the defence called an Inquirer into Deaths, to whom a statement had been made by a dying man named Andrias. This man appears to have received the gun-shot wound which caused his death at or near the same time and place at which the deceased man, for whose murder the accused was being tried, was stabbed to death. The Inquirer deposed as follows : " Before his death I spoke to him. " He made a statement as to who injured him and whom he injured." The counsel for the defence then proposed to ask what this statement was, but the learned Commissioner refused to admit the statement on the ground that it was not made and recorded in accordance with the provisions of section 466 of the Criminal Procedure Code, that is to say, it was not made on oath or affirmation and taken down by a Police Magistrate. It seems to me that, at that stage of the case and in that state of the evidence, the learned Commissioner was quite right in refusing to admit the statement. It clearly could not have been admitted under section 466 of the Criminal Procedure Code.

Then, could it have been admitted as being a dying declaration ? It appears to me that it could not. In Mr. Justice Stephen's Digest of the Law of Evidence the rule is thus stated—and, in my opinion, correctly stated : that such a declaration is admissible " only in trials for the murder or manslaughter of the declarant, " and only when the declarant is shown, to the satisfaction of the " Judge, to have been in actual danger of death, and to have given " up all hope of recovery at the time when his declaration was " made." Now, in the present case, the person who made the declaration was not the person whose death formed the subject of inquiry at the trial. Moreover, it was not shown that the declarant was in actual danger of death, and had given up all hope of recovery. It may be that he was in actual danger of death—for he died about three hours afterwards. But there is

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absolutely no evidence as to his own opinion of his condition, or whether he did or did not entertain any hope of recovery. It was incumbent on the party wishing to get the declaration admitted in evidence, to prove to the satisfaction of the Judge that the declarant had given up all hope of recovery at the time the declaration was made. This was not proved nor attempted to be proved, so that, as I observed before, on the state of facts proved before the learned Commissioner, there was no ground upon which he could have admitted this declaration.

Assuming, however, for the moment that the proper foundation had been laid for the question by its having been proved that the man Andrias was not only in actual danger of death, but also had given up all hope of recovery, still I am of opinion that his statement was inadmissible.

Mr. Pereira, who said all that could be urged in favour of the admissibility of the statement, sought to bring it within the principle of the case of *R. v. Baker, 2 M. & Rob. 53.* That was a case where two persons were poisoned by eating the same cake at the same time, and died almost immediately afterwards. The accused was tried for the murder of one of them. A dying declaration by the other person, that she had made the cake in the presence of the accused, and had put nothing bad in it, was admitted as evidence for the prosecution on the ground that "it was all one transaction." The point, however, was reserved, but, as the prisoner was acquitted, it could not be further discussed. That case was an exceptional one, and is characterized by Mr. Justice Stephen, in the book to which I have just referred, as a curious one. For my own part, I should not be disposed to follow it, except where the facts were the same, or practically identical. The present case is, however, widely different from that case. If the declarant, and the person whose death was being investigated, had both died of wounds caused by the same shot, then perhaps the statement might have been admissible. But nothing of that kind occurred here. The only ground suggested is that the declarant received his death-wound at and about the same time and place as the deceased whose death was being investigated. There is not, in my opinion, sufficient connection between the declaration and the last-mentioned death to make them "all one transaction" and bring them within the case of *R. v. Baker*. The answer, therefore, to the questiou proposed will be in the negative.

I have dealt with this matter at such length for the sole reason that a question of life and death is involved. But I feel this difficulty—that had our answer been in the affirmative, we could not have given any practical effect to our opinion.

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LAWRIE, J.—

I agree. Sufficient foundation had not been laid for the question, "What statement did Andrias make?" But if I allow myself to assume that Andrias was under due apprehension of death; that he had lost all hope of life; that he was still in a fit state of mind to be able to speak clearly and truthfully; and that he died soon after;—even if I assume these facts, evidence of a statement by Andrias made to the Inquirer into Deaths was hearsay, and therefore inadmissible, because the death of Andrias was not the subject of the charge before the jury. If the statement he made was as to the circumstances of his own death, it was irrelevant in that trial. If it was as to the circumstances of the death of a person other than himself, it was inadmissible.

ROWEL MUDALIYAR *v.* PIERIS *et al.*

C. R., Chilaw, 2,299.

Right of Crown to license use of foreshore of the sea—Competency of Mudaliyár of District to sue for rent for Crown land.

It is competent for the Crown, by its regularly appointed agents, to grant licenses to fishermen to spread their nets on the seashore or on land belonging to the Crown adjacent to the seashore.

Rent for Crown land cannot be sued for in the name of the Mudaliyár of the District, but in that of the Queen.

THE plaintiff in this case was "A. de Rowel, Mudaliyár, Mudaliyár of the Southern Division, Vaikkal," who alleged in his plaint that he had been authorized in writing by the Assistant Government Agent for the District of Chilaw to represent the Crown in this suit.

He sued the defendants for the recovery of five rupees, in that "they occupied by permission of the Assistant Government Agent "for the District of Chilaw from November, 1893, to April, 1894, "a portion of land belonging to the Crown, in extent 500 by "12 yards, and bordering the foreshore, situate at," &c.

The defendants pleaded, *inter alia*, that they were fishermen by trade, and that they and their ancestors, who were also fishermen, had, "by long usage and ancient custom," hauled their "fishing nets, boats, tackle, &c., on the land bordering the foreshore "of certain villages, free of payment to, and independent of, the "Crown or other person; and that the Assistant Government

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" Agent, through his headman, attempted to levy an illegal and " unauthorized tax by the issue of licenses to the fishermen who ' had used the foreshore for the purposes aforesaid," and that, on petition preferred, His Excellency the Governor had directed the discontinuance of the levy of the fee complained of.

The Commissioner (Mr. Lewis), after hearing evidence, referred to case No. 2,097 D. C., Colombo (*1 S. C. Reports, 11*), and gave judgment for plaintiff for one rupee.

On appeal, *Dornhorst* appeared for defendant appellant.

Templer, Acting S.-G., for plaintiff respondent.

21st February, 1895. Lawrie, A.C.J.—

I entertain no doubt that it is competent for the Crown, by its regularly appointed agents, to grant licenses to fishermen to spread their nets on the seashore or on land belonging to the Crown adjacent to the shore. It seems to me to be reasonable to make use of such land, but without the express or tacit license from the Crown to occupy the land adjoining the sea, the fishing trade would be impossible. In this case the defendant has been very tenderly dealt with by Mr. Lewis.

The decree against which the defendant appeals is to pay one rupee, and no costs. Holding, as I do, that this bit of land adjoining the seashore is a land at the disposal of the Crown, and that the defendant for some part of the six months in question occupied the land from time to time by stretching his nets there, that he had been informed by the Mudaliyár of the District that he must pay a small rent, and that he had somewhat unwillingly agreed to do so, I shall not disturb this judgment, but I must point out that the Mudaliyár had no title to sue in his own name. The suit ought to have been in the name of Her Majesty the Queen; to her is due this rent; she alone has right to sue for it; but this defect has not occasioned any failure of justice. I affirm the judgment. The Commissioner found no costs to be due to or by either party in the Court below; let that be followed by no costs in appeal.

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APPUHAMI *et al.* *v.* KIRIHAMI *et al.*

D. C., Kégalla, 474.

Slander—Action by parent and daughter for slander of daughter—Right of parent to sue—Proof of special damage.

A father cannot sue for damages for slander of his daughter although he may have felt pained by such slander.

To say of a Sinhalese woman of the Vellala caste, in the presence and hearing of many persons assembled at a dinner party, that she had run away with a Wahumpura man is actionable as slander.

Proof of special damage is not necessary in Ceylon to sustain an action for slander.

THE first plaintiff was the father of the second. They alleged that they were Kandyan Sinhalese of the Vellala caste, that the second plaintiff was married out in diga to one Kiri Banda, and that "at a dinner at Pinnewela ......, at the house of one "Punchirala, on the 18th day of January, 1894, at which several "people were present, the defendants ...... falsely and mali- "ciously spoke, said, and published to the said Punchirala and "certain other persons there present at the aforesaid dinner, "the words following; that is to say, 'Your (meaning the first "plaintiff) daughter (meaning the second plaintiff) ran away with "a Wahumpura man,' meaning thereby that the first plaintiff "was degraded and disgraced by the act of the second plaintiff, "and that he was not a fit person to associate with; and also "meaning that the second plaintiff was guilty of acts of incon- "tinence and adultery and immorality, and had disgraced herself "with a low-caste man."

They further alleged that the said words were false and malicious, and that, "in consequence of these words, the first plaintiff has "been disgraced and degraded and was not allowed to sit down "at the dinner aforesaid or to associate with the other guests; "and the second plaintiff has been disgraced in character and "reputation, and has been turned out of her house by her "husband, the aforesaid Kiri Banda; and by reason of the premises, "the plaintiffs have suffered loss and damage to the extent of "Rs. 500."

The defendants took exception to the form of the plaint and its sufficiency in law, and pleaded, *inter alia*, that the words in question were spoken without malice, and in the *boná fide* belief that they were true and under such circumstances as made them a privileged communication; that is to say, that at a private dinner, being requested by his host to sit at the same table with the first plaintiff, the first defendant declined to do so, and being asked his

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reason, he stated that "it was because first plaintiff's daughter had "run away with a Wahumpura man, a man of low caste, and "therefore his host placed first plaintiff and first defendant at "separate tables." The second defendant denied having ever spoken the words complained of.

The District Judge, after hearing the case both on the law and merits, dismissed plaintiff's action, on the ground that they had not proved that they suffered any damage in consequence of the words used.

Plaintiffs appealed.

Dornhorst, for appellants.

De Saram, for defendants respondents.

Cur. adv. vult.

14th February, 1895. LAWRIE, A.C.J.—

The first plaintiff has not alleged or proved special damage. He is not entitled to sue for words defamatory of his daughter, although he may have felt pained and distressed. This rule has been applied in India. There is a case reported in *1 Madras, p. 383*, where it was held that a brother cannot sue for slander of his sister. In the case before us the father and daughter join in the action, which, so far as the father is concerned, should, I think, be dismissed with costs.

I agree that it is not proved that the second defendant slandered the second plaintiff. He was present at the wedding party, and heard and probably sympathized with his brother, but it was an exaggeration to assert that he too repeated the words complained of. The action as against him must be dismissed with costs.

With regard to the action by the second plaintiff against the first defendant, the case is, I think, weak. From early times the Sinhalese have been very particular as to those who are invited to weddings. It is regarded as an affront to be omitted, and as an equal affront to be invited to meet inferior people.

Marshall, *p. 412*, gives two instances where refusals to sit down at a marriage feast with persons of doubtful reputation were held to give a cause of action against the too fastidious guest, and therefore the objection stated to this young lady's presence on the particular occasion was not unusual, though of course I do not put it, as the defendant puts it, that the occasion was.

The plaintiff alleged special damage, that she had been turned out of her house by her husband, but that was disproved at the trial. She and her husband had ceased to live together before this wedding.

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The rather harsh rule of English law, which denies damages to a woman whose character has been assailed, unless she can prove special damages, does not obtain in this Colony, and for this slander the plaintiff is entitled to damages. If the defendant had expressed his regret and had tendered five rupees as damages, I would have thought that he had done enough, but he has aggravated the cause of action by repeating the defamation in the answer, and I think he has made himself liable in at least Rs. 50 damages and the costs to which the second plaintiff has been put.

WITHERS, J.—

This is an action by a father and his daughter to recover damages against two defendants for slander.

I think the father was improperly joined.

The District Judge has found that the second defendant did not utter the words complained of, and has disallowed the action against him. We see no reason to disturb that part of the judgment, which regards a mere question of fact.

The first defendant admits that, at a private dinner party, he excused himself from sitting down at the same table with the first plaintiff, for the reason that the latter's daughter had run away with a Wahumpura man of low caste.

This statement was made in the presence and hearing of a large number of people assembled for the entertainment, and in the presence of the plaintiffs.

The second plaintiff was at the time the reputed wife in diga of a person of her own caste—Vellala caste.

It cannot be doubted that this statement was calculated to reflect upon the moral character of the second plaintiff and injure her in the estimation of society.

What is contumelious in itself, as such language is, presumes the *animus et affectus injuriandi*, which is an element of slander.

The District Judge, however, dismissed the action because the plaintiffs had adduced no evidence to show that either of them had suffered the smallest damage in consequence of this contumely.

The Roman-Dutch law requires no proof of special damage to sustain an action for slander.

If contumely is published deliberately and with intention to offend another, the speaker is liable to be sued for amends.

There are various degrees of contumely, depending on the person of whom, the place where, and the occasion on which, the contumelious language is used, to say nothing of the nature of the language uttered.

There was no defence by the first defendant, unless the frivolous plea of a privileged occasion can be regarded as such. He does not pretend that he spoke in play, or in jest, and under the influence of anger provoked by the person addressed, or under the influence of intoxication. He does not even apologize for what he said. He avers that he repeated what had been village talk, and that he believed it to be true.

This is but an aggravation of his offence.

I would set aside the judgment against the first defendant and adjudge him to pay a sum of Rs. 50 with costs.

BROWNE, J.—

I agree.

MALHAMI MUHANDIRAM *v.* JUANISA *et al.*

P. C., Ratnapura, 10,804.

Gemming without license—Criminal trespass—Section 247 of the Penal Code—Evidence necessary to support charge of criminal trespass—Ordinances No. 5 of 1890 and No. 10 of 1894.

Gemming without a license on the bank of a river flowing along the property of a private owner is not punishable as criminal trespass under section 427 of the Penal Code without proof that entry on such land was made with intent to commit an offence as defined in section 38 of the Code to intimidate, insult, or annoy any person in possession of such property.

Unlicensed gemming on lands other than Crown property is punishable under Ordinance No. 5 of 1890, amended by Ordinance No. 10 of 1894.

THE complainant charged the defendants with having committed criminal traspass on a certain land of which he had the leasehold, and theft by opening gem mines therein and stealthily removing gems, in breach of sections 433 and 367 of the Penal Code.

It was proved that the accused had a pit by the edge of the river which skirted the land in question, and that water was baled from the pit into the river, whence it was contended that the pit was in the land, and that the accused working in the pit were guilty of criminal trespass.

The Police Magistrate found accordingly, and sentenced each of the accused to pay a fine of Rs. 10, under section 433 of the Penal Code.

On appeal there was no appearance of counsel for appellant or respondent.

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28th May, 1895. LAWRIE, A.C.J.—

Is unlicensed gemming on the sandy and gravel banks of a stream a criminal trespass on the property of the owners of the ground adjoining the stream ?

It is so, if gemming be an *offence* as defined in section 38 of the Penal Code, or if the entry on the land be done to intimidate, insult, or annoy the person in possession of the property.

There are no facts proved from which an intention to intimidate, insult, or annoy can be inferred.

The meaning of the word " offence " in section 427 of the Penal Code is defined in section 38 as *denoting a thing punishable in Ceylon under the Penal Code, or a thing punishable under any other law with imprisonment for a term of six months or upwards, whether with or without fine.*

Gemming without a license is not an offence under the Code. It is an offence under Ordinance No. 5 of 1890 amended by Ordinance No. 10 of 1894. But for a first offence the punishment is not more than three months, and hence the entry on a land for the purpose of gemming is not criminal trespass. It must be prosecuted and punished under Ordinance No. 5 of 1890.

I set aside the conviction and sentence, and acquit the accused.

QUEEN *v.* DANIEL.

D. C., Kẹgalla, 836.

Right to appeal for enhancement of punishment—Section 406 of the Criminal Procedure Code—Error of law or of fact—Error in point of opinion—Right of party injured or other private complainant to appeal, in a case where the parties are the Crown and the accused—Application for revision of proceedings under s. 426—Necessity for notice of revision.

An appeal for enhancement of punishment is permissible on the ground of error of fact or of law, in cases where both imprisonment and fine have been imposed, and in the cases not excepted in sections 403, 404, and 405 of the Criminal Procedure Code.

Error in point of opinion on the part of a Judge as to the degree of injury to a complainant, or the degree of criminality of an accused, or as to the nature or amount of punishment inflicted, does not amount to an error in law.

Insufficiency of punishment could only be an error in law when a minimum amount of penalty had been prescribed but had not been imposed.

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In a criminal prosecution by the Crown, the party injured or other private complainant has not the right of appeal provided for in section 406 of the Criminal Procedure Code.

An application for revision under section 426 will not be entertained without due notice to the respondent.

THE indictment in this case charged the accused with having voluntarily caused grievous hurt to one Mr. Dharmaratna. The accused pleaded provocation, and admitted that he struck him as hard as he could with the fist on the eye and on the ear once or twice, and threw him out of the verandah. The District Judge found the accused guilty, and "sentenced him to simple "imprisonment till the rising of the Court and to a fine of Rs. 50."

The Attorney-General appealed on the ground that the judgment of the Court below was not in conformity with the requirements of section 372 of the Criminal Procedure Code, and that the sentence imposed on the accused was far too inadequate in view of the circumstances of the case.

Dornhorst, for the accused, urged by way of preliminary objection that, as inadequacy of sentence was neither an error of law nor of fact, the appeal preferred should be rejected. He contended that no appeal lay in the present case under sections 404 or 405 of the Criminal Procedure Code, and that if the appeal be taken as one from a "party" as provided in section 406, it could be entertained only on the ground of error of law or fact, but not for mere error of opinion on the part of the Judge in estimating the effects of the circumstances proved in the case.

Cooke, C.C., for the Crown, replied on the preliminary objection and insisted that the District Judge had committed a clear error of law in not acting conformably with section 372 of the Criminal Procedure Code. If it be held that an appeal did not lie, it was open to the Supreme Court to revise the proceedings under section 426.

Canagaratne, for Mr. Dharmaratna, moved, that if the appeal of the Attorney-General should fail on the preliminary objection raised by Mr. Dornhorst, his client should be allowed to file a petition of appeal, as the party really interested in the case.

Cur. adv. vult.

12th February, 1895. BROWNE, J.—

The accused was charged with grievous hurt (Penal Code, section 316), and was found guilty (without its being specifically stated of what offence), and sentenced to simple imprisonment until the rising of the Court and to pay a fine of Rs. 50.

When the appeal was called for argument, Mr. Dornhorst, for accused, submitted that no appeal lay, since the Attorney-General

appealed for the purpose of enhancing the sentence, which the Ordinance did not entitle him to do, the case falling within section 406, and the question of sufficiency of sentence not being an error of law or fact.

Were I to entertain a statement made in argument, without any formal verification, on behalf of the would-be appellant Dharmaratna, that the accused was never imprisoned at all, and so conclude, it might be I would have to hold, that the matter was one falling under section 405 of the Criminal Procedure Code, and I should at once reject such appeal offered. Finding, however, that sentences of both imprisonment and fine have been passed, I must hold, following the decision in *9 S. C. C. 49*, that this not being within the provisions of sections 403, 404, or 405, an appeal does lie for any error of law or fact.

In appealing for an enhancement of punishment, does the Attorney-General appeal for error of fact? Apparently not, for the accused has been convicted of the charge preferred, and not of only some minor offence thereunder, upon the ground that the facts proved justified only the lessor conviction.

Does he appeal for error of law? He does not complain that evidence has been improperly admitted or rejected, or that facts have or have not been found, or that these required some other verdict, or that the Magistrate had not power to impose the sentence which he did.

He has not shown that anything has been done or permitted of which the law, correctly regarded, did not entirely allow. The Magistrate may (in the Attorney-General's judgment) have erred in point of *opinion* as to the degree of injury to the person at whose complaint, made outside the District Court, he for Her Majesty has prosecuted, or as to the degree of criminality of the accused, and in consequence of either, or of natural inclination to mercy, &c., as to the nature or amount of the punishment he inflicted, all or some of which might, when advanced, impel or justify this Court, if so empowered as under section 426, to entertain an application in revision of conviction and sentence. But I hold these are not grounds of law, nor do they disclose that any error in law has been made which vitiates either the conviction or sentence. Insufficiency of punishment could only be an error in law when a minimum amount of penalty had been prescribed but had not been imposed.

I therefore rule that the appeal of the Attorney-General fails, and must be rejected. I was asked in such a contingency to revise the proceedings under section 426, but I do not know what notice to any such effect has been served upon the respondent

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(for no copy of notice issued is in the record), and I must decline to act as so requested.

As to the application on behalf of Dharmaratna, that he should be held entitled to file a petition of appeal and be heard thereon, I hold that he is not such a party as section 406 includes in that privilege. He is, as I have said before, only a person who, prior to these proceedings, put in motion the prosecution to see that a criminal offence was punished by informing her of the particulars thereof. He might have been not the person injured, but, as often happens, a relative of his, or some official, as a police officer, who first made complaint to the Police Court. I therefore disallow his application.

FERNANDO *v.* WELENIS APPU *et al.*

P. C., Kalutara, 19,320.

Witness remaining within hearing of evidence given in Court—Right of Court to reject evidence of such witness.

A Judge has no right to reject a witness on the ground that he remained in Court in contravention of an order to withdraw.

AFTER the case for the prosecution had been closed, the Police Magistrate recorded that the accused "did not call any "witnesses for the defence except Saris, who was not in the "witness-shed at the time, but close to the court-house and heard "all previous evidence. I decline to hear him."

The accused having been convicted of voluntarily causing hurt under section 314 of the Penal Code, they appealed.

Pereira, for appellant.

The Supreme Court set aside the judgment of the Court below and sent back the case in order that the witnesses for the accused might be examined.

7th May, 1895. LAWRIE, A.C.J.—

In my opinion it was irregular to refuse to allow the examination of a witness for the accused merely because it was said that the witness had been close to the court-house during the trial, and had heard all the previous evidence. Taylor on Evidence, § 1,260, states the law.

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It was settled long ago in *Chandler v. Horne, 2 M. & Rob., p. 433,* that a Judge has no right to reject a witness on the ground that he remained in Court in contravention of an order to withdraw.

The olden law of Scotland, which the learned Police Magistrate seems to have followed, was corrected by the Act 3 & 4 Vic., c. 59, section 3.

The Ceylon Civil Procedure Code contains a section (174) at variance with the English law, but our Criminal Procedure Code has no corresponding section.

Of course, if in the course of examination or cross-examination, a witness admits he was in Court during the examination of a former witness, it is a point worthy of note; but the accused ought not to be deprived of the right to call witnesses merely because they have not been kept out of the court-house.

RODRIGO *v.* MEL.

P. C., Pánadurê, 12,529.

Master and servant—Ordinance No. 11 of 1865—Agreement to attend at certain places for wages for dragging fishing nets.

A person who by a written contract undertakes for wages to attend at certain places for and in the work of dragging nets cast into the sea is not a servant within the meaning of the Ordinance No. 11 of 1865.

THE facts of the case appear in the judgment of the Supreme Court.

Jayawardene, for appellant.

Pereira, for respondent.

19th February, 1895. WITHERS, J.—

This is a written contract whereby one person, for certain wages, undertakes to attend at certain places for and in the work of dragging nets cast into the sea.

In my opinion such a person as the defendant is not a servant within the meaning of the Ordinance No. 11 of 1865; and if he is not a servant, it goes without saying that he cannot contract himself into what I may call the criminal provisions of that Ordinance. I do not see how it could be said of this man that he quitted the service of his employer, and this is what he has been convicted of.

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Even if this is a contract within the purview of section 7 of the Labour Ordinance, it is not alleged and proved by the complainant that the defendant neglected or refused to attend at any of the places, or at any of the times mentioned in the contract, without reasonable cause, or that he was guilty of any wilful disobedience of orders that might well be given him during the days in which he was required to attend for the dragging of nets.

Hence, because he is not a servant under the Ordinance, and because he has not been proved to have violated his contract in any sense appropriate to the contract within the 11th section of the Ordinance, I set aside the conviction and acquit the accused.

QUEEN *v.* VAIYAPURI.

D. C., Colombo, 1,044.

Merchandise Marks Ordinance, No. 13 of 1888, s. 3—Offence thereunder—Election by accused to be tried before the District Court—Information by Attorney-General—Jurisdiction of District Court to entertain the information.

A District Court has jurisdiction to inquire into and determine into an offence punishable under the Merchandise Marks Ordinance, section 3, when the accused has elected, at the magisterial inquiry, to be tried by the District Court.

Upon such election, it is competent to the Attorney-General to exhibit an information to the District Court for the trial of the accused.

THE information exhibited in the District Court of Colombo by the Attorney-General in this case, stated that the accused had committed an offence punishable under the Merchandise Marks Ordinance (No. 13 of 1888), section 3, sub-section 2, and after alleging the particulars of the offence gave the Court to understand that " on or about the 4th of July, 1894, on complaint being made " before the Police Court of Colombo in respect of the said offence, " and the said Vaiyapuri Pillai then being present before the said " Court, and being informed by the said Court of his right to be " tried by the District Court of Colombo, elected to be tried by the " said District Court," &c.

Summons having been allowed on this information, the accused appeared and submitted that the Court had no jurisdiction to entertain and inquire into the charge contained in the information, and that the Attorney-General had no power to file such an information.

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The learned (Acting) District Judge (Mr. Joseph Grenier) overruled these objections, and, after evidence heard, found the accused guilty, and sentenced him to pay a fine of Rs. 200 and the costs of the prosecution as costs in the first class.

The accused appealed.

Bawa, for appellant.

Dornhorst, for respondent.

Cur. adv. vult.

12th February, 1895. BROWNE, J.—

A private complainant having instituted a prosecution against the appellant before the Police Court of Colombo for offences under section 3 (1) *b* and *d* of the Merchandise Marks Ordinance, 13 of 1888, and the appellant having, on his appearance before the Police Court, elected under clause 5 of the same section to be tried before the District Court, the Magistrate proceeded to inquire into the complaint as a case not triable summarily, with the result that he discharged the appellant. In appeal this Court (*3 S. C. R. 152*) quashed the proceedings subsequent to the recorded election of the respondent, but of course did not indicate what further procedure might thereafter be available to the complainant. The Attorney-General subsequently filed an information in these proceedings in the District Court, and obtained summons against the appellant. On his appearing thereto, and being called on to plead to the indictment, it was objected on his behalf that the Court had no jurisdiction to entertain or inquire into the charge in the information, and that the Attorney-General had no power to file such information in that Court.

The learned District Judge, in his very full consideration of these questions now raised for the first time, has pointed out that the Criminal Procedure Code, in sections 263–4, has contemplated that cases shall come before a District Court only in two ways: on committal from a Police Court, or by order of transfer from some other Court; that section 8 of that Code gives District Courts jurisdiction in criminal matters " subject to the provisions of the Code "; and that section 13 provides that a District Court shall not take cognizance of any offence as a court of original criminal jurisdiction unless there has been such a committal or transfer; and that chapter 20 has empowered the Attorney-General to exhibit original information at his pleasure in the Supreme Court only, and in the Supreme and District Courts after the discharge of an accused by a Police Court under the provisions of chapter 16, when he is of opinion that such accused person should not have been discharged, and only thereafter. He further remarked that

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"the provisions in Ordinance No. 13 of 1888, section 3 (5), related "to a person charged, and directed he should be put to his election "before the charge is gone into," and said he was inclined to consider that section 226 [*i.e.*, section 219 (2) of Ordinance No. 22 of 1890] should be read therewith or thereinto, and that on the accused electing as here to be tried by the District Court, the Magistrate should record the necessary preliminary evidence whereon the District Court could subsequently proceed, and commit him thereto. In view, however, of the order of this Court previously made, holding that the Police Magistrate was *functus officio* as soon as election was made by the accused, he assumed he had jurisdiction in respect of the information filed, and he tried the accused and convicted and sentenced him.

This is but a very brief *précis* of the views expressed with full comment and reasoning in some 24 pages of the record. I do not, however, recite them more fully, for the reason that I would affirm that the District Court has jurisdiction, and the Attorney-General in such a case as the present has a right to present his information, for a reason which does not appear to have been considered in the previous argument. That is, that the District Courts are not dependent for their criminal jurisdiction solely upon the enactment of section 8 of the Criminal Procedure Code, for that, six years after such power was given to it, section 66 of the Courts Ordinance, in (like section 8 of the Code) giving a District Court full power and authority to hear, try, and determine all prosecutions and charges instituted and preferred before it against any person for any crime committed within its district, did not limit that power and authority to be "subject to the provisions of this Code" as that section 8 had done. Section 8 enacted, "shall have, as "heretofore, and subject to the provisions of this Code, cognizance "of and full power to hear, try, and determine." The provisions of the Code were to rule the District Court in everything in its cognizance of and its power to try and determine all prosecutions. Section 66 says nothing of cognizance or subjection to the Criminal Procedure Code, but "shall have full power and authority :......... to hear and determine," and makes only a limitation in regard to the procedure inside the Court itself that it shall be "in manner in the Criminal Procedure Code .... provided." The jurisdiction so conferred is not fettered by the provisions of section 13 of the Criminal Procedure Code, and a prosecution of the character of the present will be permissible so long as it is conducted as prescribed by chapter 21 (omitting sections 263–4, which are inapplicable). This safeguard however exists, that the Attorney-General or his nominee shall conduct the prosecution,

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wherein I consider is included the framing of the charge or information or indictment, for I do not see that under section 261 it would be competent for any private person to appear and do so.

Section 4 of the Criminal Procedure Code requires that all offences under any such enactment as the Merchandise Marks Ordinance shall be inquired into and tried according to the provisions of that Code, subject to any enactment for the time being in force regulating the manner or place of inquiry into or trying such offence. And now that the ruling of this Court has made it clear that, as soon as the accused's election of the District Court removes the prosecution instantly thither, this section I read as meaning in such a matter as the present that the offence is to be inquired into and tried under the provisions of chapter 21 only, it being (with the supplementary chapter 24) the only provisions relating to trials by a District Court.

I therefore hold that the District Court had jurisdiction to inquire into and determine the matter of this prosecution.

I further hold that the accused appellant was rightly convicted. I give the same credence as the Court below has given to the evidence of the witnesses, and I do not see that the certificate, which bears the seal of the Colonial Secretary's Office, and is signed "True copy: H. W. Green, for Colonial Secretary," was improperly received in evidence under the provisions of section 27 of Ordinance No. 14 of 1888. I presume, until the contrary is shown, that this Assistant to the Colonial Secretary so signed by some authorization as section 2 of that Ordinance contemplates.

SARAM *v.* WEERA.

P. C., Colombo, 37,639.

Criminal Procedure Code, chapters XVI. and XIX.—Change of proceeding from inquiry into trial—Criminal Procedure Code, s. 226 (Ordinance No. 22 of 1890, s. 7)—Right of Police Magistrate to convict upon evidence taken in a case which he has no power to try.

In proceedings taken under chapter XVI. of the Criminal Procedure Code, a Police Magistrate has to take and record evidence for the prosecution with the view of ascertaining whether there is such a *primâ facie* case made out against the accused as could justify him in committing the accused for trial to a Superior Court, and not to determine his guilt or innocence which is in issue only in trials under chapter XIX.

Where, in the course of proceedings initiated under chapter XVI., a Magistrate finds that the facts proved amount to an offence triable by him summarily under chapter XIX., the proper course is to stay

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proceedings on the inquiry, frame a fresh charge, and try the case, giving the accused notice that he is on his trial, and affording him sufficient time to prepare his defence.

Section 226 of the Code (as amended by Ordinance No. 22 of 1890) refers to cases where a Police Magistrate is trying a case over which he has jurisdiction, and not to cases where he is not acting as Judge, but as an inquirer. Its import is that, when a Judge is trying a case and finds that the charge laid was not correctly framed according to the facts which appear in evidence before him, but that some other offence over which he has jurisdiction is proved, he may convict of that offence.

Facts which appear in the depositions of witnesses taken, not for the purpose of a trial, but for the purpose of an inquiry, cannot be said to be proved for the purpose of a conviction.

THE accused in this case was charged at the instance of the Superintendent of Police under section 392 of the Penal Code with criminal breach of trust as a public servant, in that, while acting as storekeeper of the Police Department, he was entrusted with a sum of Rs. 100, whereof he misappropriated a sum of Rs. 86. On being brought up on a warrant, the Police Magistrate explained the charge to the accused, who stated he was not guilty. Evidence was taken on a subsequent day and a charge formulated.

The Police Magistrate then recorded as follows :—

Accused denies the charge. Mr. Advocate Bawa, for accused, addresses the Court on the question of jurisdiction, and the question of the innocence of the accused .... Counsel has quoted a case in the Indian Courts, in which a public servant, who had been entrusted with the care of stamps, the property of the Government, with the full knowledge and consent of his superior officers, had misappropriated those stamps to his own use, was held guilty of criminal breach of trust as a public servant—an offence punishable under section 392 of the Ceylon Penal Code, and not within the jurisdiction of a Police Court; but in that case it was decided that the responsibility for the due custody of the stamps had been properly delegated. In another case reported in the same book submitted to me, in which responsibility had been improperly delegated, it was held that the delinquent could not be charged with criminal breach of trust as a public servant. It is for this reason, " that the responsibility delegated to the accused Weera has been most improperly delegated," that I overrule the argument against my jurisdiction.

Accused was a very subordinate clerk on small pay; he was book-keeper and storekeeper, and as such his duties were to keep books and keep stores; it was no part of his duty to handle Government moneys, and when allowed to do so by his superiors he lay under no responsibility to Government for any misappropriation of Government money; the fact that his immediate superiors had allowed him and his predecessor in office to handle public moneys cannot affect the propriety of his being allowed to do so. The proceedings disclose the existence of a good deal of laxity in money matters in the office of the Superintendent of Police, Western Province, but I cannot allow this laxity to render the accused not liable to conviction on the very grave charge of criminal breach of trust as a public servant. Regarding the guilt of the accused the evidence is clear, and calls for no remarks.

The Police Magistrate found the accused guilty under section 391, and sentenced him to three months' rigorous imprisonment.

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On appeal, *Bawa* appeared for him, and *Dumbleton, C.C.*, for respondent. 1895. *June 19.*

The Supreme Court quashed the proceedings and sent the case back to be investigated as a non-summary case.

19th June, 1895. BONSER, C.J.—

The proceedings in this case should, in my opinion, be quashed, and the case sent back to be dealt with according to law.

The accused was charged under section 392 of the Penal Code with breach of trust as a public servant. He was brought up before Mr. W. H. Moor, the Acting Police Magistrate of Colombo, on a warrant on this charge. The charge was read and explained to him, and then the Magistrate proceeded to deal with the charge. Now, that charge was one which the Magistrate had no power to try. He could only deal with it under chapter XVI. of the Criminal Procedure Code, which lays down the procedure in such cases. He has to take and record the evidence for the prosecution with the view of ascertaining whether there is such a *primâ facie* case made out against the accused as would justify him in committing the case for trial before a superior Court. He is, therefore, exercising a strictly limited function. It is not his duty to determine the guilt or innocence of the accused. That is not in issue in proceedings under chapter XVI. of the Criminal Procedure Code. And we know by experience that proceedings before a Magistrate, as held under that chapter, are conducted in a very different way from proceedings held before him on the trial of an offence. In the latter case the accused is on his trial, and he or his counsel cross-examines the witnesses for the prosecution with a view to establishing his innocence. In the former case, the accused and his counsel, if well advised, content themselves with watching the case to see that no improper evidence is recorded ; but, if they are wise, they do not endeavour to break down the evidence of the witnesses for the prosecution unless their case is a very clear one.

In the present case, the accused was brought up on the 3rd of June, and charged with an offence under section 392, and the Magistrate proceeded to record evidence under chapter XVI. He pleaded not guilty to this charge under section 392, and the case was adjourned to the 5th. On the 5th the witnesses for the prosecution are all called, and, at the conclusion of the proceedings of that day, the Magistrate records that the accused is charged under section 391 of the Penal Code, and that the accused denies the charge. Now, section 391 is a section

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1895. June 19. — Bonser, C.J.

which deals with the offence of criminal breach of trust by a clerk or servant, and that is an offence over which a Police Court has concurrent jurisdiction with District Courts and the Supreme Court. No notice, however, appears to have been given to the accused that the Magistrate was going to deal with the case summarily, and no fresh evidence was called; but the Magistrate, after hearing some remarks from the defendant's counsel, forthwith convicts the defendant, not of the offence with which he was originally charged, but of a new offence. The proceedings were thus suddenly, at their conclusion, changed from an inquiry as to whether there was a *primâ facie* case that the accused had been guilty of one offence into a trial of the guilt or innocence of the accused on an entirely fresh charge of another offence.

It is said that the Magistrate acted under section 226 of the Code as amended by Ordinance No. 22 of 1890. Of course, if the Code says it may be done,—although the result of such a course would be exceedingly unfair to the accused,—we are bound to obey the law. But in my opinion section 226 does not justify what was done in the present case. That section provides that a Magistrate "may convict an accused of any offence over which a Police "Court has summary jurisdiction, which, from the facts admitted "or proved, he appears to have committed, whatever may be the "nature of the complaint or information." My opinion is that this section refers to cases where the Police Magistrate is trying a case over which he has jurisdiction, and not to cases where he is acting not as Judge, but as an inquirer; and I am confirmed in this view by the heading of the chapter. That section is contained in chapter XIX., which is headed, "The trial of cases where a "Police Court has power to try summarily." That heading shows that the chapter is dealing with trials. Section 226 imports that when a Judge is trying a case, and finds that the charge was not correctly framed, according to the facts which appear in evidence before him, but that some other offence over which he has jurisdiction is proved, he may convict of that offence.

It will be noticed that section 226 speaks of facts proved. Now, I do not think that facts which appear in the depositions of witnesses taken, not for the purpose of a trial, but for the purpose of an inquiry into the *primâ facie* guilt of an accused, can be said to be proved for the purpose of a conviction. The proper course for a Magistrate to adopt in such a case would be to stay proceedings on the inquiry, frame a fresh charge, and try the case (I was about to say *de novo*, but as there was no trial these words would not be appropriate), giving the accused notice that he was now to be put on his trial, and affording him time to prepare his defence,

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—such time as would be sufficient,—because the accused is not there to make his defence, but to have the question decided whether there is a *primâ facie* case made out against him—for that purpose, and no other.

For these reasons the conviction in this case is quashed, and the accused remanded to the Police Court to be dealt with according to law.

PERERA *v.* RODRIGO.

1878. *Jan. 17.*

D. C., Kandy, 76,122.

Lease—Specific performance of—Holding over.

A lessee is not entitled by virtue alone of the title to possession passed to him by the lease to maintain an action of ejectment against a stranger to the lease in respect of lands, of which he, the lessee, was never put into possession by his lessor.

Semble, that where a person is put into possession of land by the owner in pursuance of an invalid parol lease for a term of years, he cannot be ejected by that owner until his holding, whatever it is, has expired, or has been put an end to by a proper notice.

THE plaintiff, by virtue of a deed of lease dated 30th January, 1878, executed by persons not made parties to the suit, sought in his libel to be put and placed in possession of certain lands, alleging that defendant was in forcible possession of the same. The defendant resisted the action on the ground that he had a prior verbal lease from the plaintiff's lessors yet to run for five years, and that, having effected material improvements on the demised premises, he was entitled to retain possession of them, if not for the full period of the lease, at all events until he was repaid a proper compensation for the improvements in question.

The District Judge gave judgment for plaintiff as prayed.

On appeal this decree was reversed.

Van Langenberg, for appellant.

Dharmaratne, for respondent.

17th January, 1878. PHEAR, C.J.—

The plaintiff in this case has shown no cause of action against the defendant. He has entered into a contract of lease with the owner of the lands which are the subject of suit, and has not yet obtained from that owner performance of the contract. To obtain specific performance he must bring his suit against the person

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1878.
Jan. 17.

PHEAR, C.J.

with whom he made the contract, not against a stranger to that contract, as the defendant is. And so far as the evidence which has been given in the case goes, it would appear that even as against the owner of the land the defendant is in rightful possession. He appears to be holding over after the expiration of a definite term, and as he has been allowed to hold over, he can only be called upon to give up possession by the owner after his present indefinite term had been duly put an end to by such notice as under the circumstances may be requisite. In other words, as against the owner of the land who let him into possession, he does not become a trespasser until the period of his holding, whatever it be, has elapsed. And the plaintiff in this suit does not even represent the owners. At best he has got such right of action against the owner as the contract of lease gives him.

The decree which is appealed against is set aside, and the plaintiff's suit dismissed with costs.

1894.
Oct. 2.

MURUGAPPA CHETTY *v.* SAMARASEKARA *et al.*

PAVISTINAHAMI, Claimant.

D. C., Negombo, 1,178.

Civil Procedure Code, s. 241—Claim to property seized in execution—Life-interest of claimant.

Where a seizure in execution had been made of certain lands under a decree which declared them to be specially bound and executable, subject to the life-interest of one D. P. in them, and D. P. applied to the District Court that her claim to have the seizure released and the property declared not liable to be seized and sold in execution be investigated under section 241 of the Civil Procedure Code.

Held, that it was not competent to the District Court to refer the claimant to a separate action, but that her claim was one to be investigated and determined under sections 241 and 242.

THIS was an appeal from an order of the District Judge of Negombo upon a claim made by one Pavistinahami before the Fiscal to certain lands seized in execution of a decree entered in this case against the defendants, declaring that the said lands were "specially bound and executable for the said decree, subject "to a life-interest of K. D. Pavistinahami in the first ten mentioned "lands."

The claimant, who was admitted to be in possession of the lands at the time of the seizure, submitted to the Court that the mortgage

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and seizure of the lands were not justifiable under a deed which she brought into Court. She prayed for a release of the seizure, and that the lands be declared not liable to be seized or sold in execution during her lifetime. 1894.

The District Judge, relying upon the analogy of section 278 of the Indian Civil Procedure Code and the case of *Deefholts v. Peters*, reported in *14 Ind. L. R., Calcutta Series, 641*, held that the question of the extent and nature of the power to deal with the property conferred on the grantees of the deed produced by the claimant, and the effect of the life-interest reserved to her, were not questions "responsive to the only tests which the Court is empowered by "sections 244 and 245 to apply in such an inquiry, namely, the tests "of possession, and that it is out of place to attempt to determine "such questions by such tests .... The remedy is by "separate action." He discharged the application for inquiry into the claim, with costs.

The claimant appealed.

Dornhorst, for claimant appellant.

Wendt, for respondent (creditor).

Aserappa, for defendant respondent.

Cur. adv. vult.

2nd October, 1894. Lawrie, A.C.J.—

I am unable to share in the doubts or to appreciate the difficulties of the learned Judge.

The plaintiff got judgment and applied for and got writ against the defendants' property, lands were seized by the Fiscal, then a man came forward to claim the lands under seizure as his own, denying that they were executable for the debt of the judgment-debtor.

The learned Judge, on the analogy or supposed authority of Indian decisions, refused to investigate the claim. The Indian Code is, in this matter of seizure in execution, quite different from ours, and the decisions quoted by the District Judge seem to me to have no value to regulate our procedure of seizure and sale by a Fiscal.

It may be that, if a Court directs a sale under section 201, and if the person especially nominated by the Court were in course of carrying out the Court's special order, there would be no room for a claim by a third party; indeed, the person nominated by the Court would have no jurisdiction to try and determine the rights of claimants. I look on this as a case of an ordinary seizure: the

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1894. plaintiff himself so treated it. The Code gives a right to those who object to a sale in execution to be heard and to have their claims adjudicated on.

The order should be set aside, and the case sent back for investigation of the claim. The appellant is entitled to the costs of the discussion in the District Court and in appeal.

WITHERS, J.—

It was argued in the first instance that the order before us is not an appealable order, but inasmuch as it discharges the application for inquiry into the claim with costs, it finally disposes of the matter, and is therefore obnoxious to an appeal.

As the judgment-creditor took out the ordinary writ against property in execution of a decree he must take the consequences.

By section 241 of the Civil Procedure Code the Court is required, in the event of the Fiscal reporting a claim preferred to property or an objection offered to the seizure or sale of property which has been seized in execution of a decree, to proceed in a summary manner to investigate such claim or objection. Into the nature of his claim or objection I do not propose to inquire. What a claimant must prove to induce the Court to remove the seizure or to stay the sale is indicated in the sections following the one above referred to.

I would remit the case for the investigation and determination of the claim.

NUGAPITIYA MUHANDIRAM *v.* SUDALAYANDI *et al.*

1895.
July 10, 11.

P. C., Kégalla, 13,750.

Forest Ordinance, 1885—Rule made under chapter IV.—Clearing land for chena cultivation—Land at the disposal of the Crown—Evidence.

On a charge laid under rule 1 of the rules framed under chapter IV. of the Ordinance No. 10 of 1885, that the accused cleared a land at the disposal of the Crown without a permit from the Government Agent, it is necessary to prove that the land was cleared for chena cultivation, that such land was at the disposal of the Crown, and that it was not within a reserved or village forest.

Semble, per BONSER, C.J.—The only intelligible way of interpreting the expression "land at the disposal of the Crown" in the interpretation clause is to read clauses (*b*), (*c*), and (*d*) as cutting

down the generality of the definition given in clause (*a*), so that the meaning of that expression would appear to be all forest, waste, unoccupied, or uncultivated land, which has not been expressly granted away by the Crown (clause *b*), or in respect of which the Crown has not waived its right by issuing its certificate of no claim (clause *c*), or which has not been registered a temple land (clause *d*). 1895.

THE plaint charged the accused with unlawfully and wilfully, and without obtaining the permission of the Government Agent of the Province of Sabaragamuwa or of the Assistant Government Agent of Kęgalla, clearing or causing to be cleared for chena cultivation the land called Galpilleheressa, being a land at the disposal of the Crown, and not included in a reserved or village forest, in breach of rule 1 of the rules framed under chapter IV. of the Ordinance No. 10 of 1885, &c.

Rule 1 (published in the *Gazette* of 22nd March, 1889) was as follows: " No land at the disposal of the Crown shall be cleared " for chena cultivation without a permit from the Government " Agent," &c.

After evidence heard for complainant and the accused, the Police Magistrate found both the accused guilty of " clearing a land at " the disposal of the Crown, to wit, Galpilleheressa, for chena " cultivation without a permit," &c., and sentenced them to a fine of Rs. 30 and Rs. 5 respectively.

The accused appealed.

Bawa, for appellant, contended (1) that rule No. 1, upon which the conviction was founded, was *ultra vires* of section 41 (*a*), for while the rule provided against " clearing for chena cultivation," the Ordinance empowered the making of rules for only regulating or prohibiting the cutting of or setting fire to chenas ; (2) that there was no evidence that the land which had been cleared was not included in a reserved or village forest; and (3) that there was no evidence that the appellant had himself committed the offence complained of.

Rámanáthan, S.-G., for the Crown: The terms of rule 1 are practically the same as the terms of section 41 (*a*). " Clear- " ing for chena cultivation " involves the operation of " cutting " and " setting fire " to chenas, and as the *Gazette* which published the rule sets forth that rule 1 and certain other rules following it were made under section 41, the words " clearing for chena cultivation " should be taken to mean cutting and setting fire to the chena named in the plaint. Rule 1 is therefore *intra vires*. [BONSER, C.J.—But is the land " at the disposal of the " Crown ? "] Yes, because it is proved that it was forest before the

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1895. accused cut the trees standing on the land. It must be admitted that no evidence has been laid before the Court that the land in question was not included in a reserved or village forest. Mr. Justice Withers, in 8,926, Police Court, Nuwara Eliya, decided on 19th March last (*New Law Reports, p. 73*), held that such evidence was necessary, but he allowed the Crown an opportunity to supply the deficiency at a further hearing which he ordered. The Crown should be given a similar opportunity in the present case. [Bonser, C.J.—Ought you not also to prove that the land in question is one " in respect of which no person has acquired any " right by written grant or lease made by or on behalf of the British, " Dutch, or native Governments, and duly registered as required " by law " ; or one " in respect of which no person has acquired a " right as against the Crown by the issue to him of any certificate " of no claim by the Crown under Ordinance No. 12 of 1840 or " No. 1 of 1844 " ; or one " not registered as temple lands under " Ordinance No. 10 of 1856 ? " These appear to be qualifications of the expression " land at the disposal of the Crown."] The definition of that expression has not been so construed before. What appears as (*b*), (*c*), and (*d*) in the definition clause, and what has just been interpreted as qualifications of (*a*), have always been read as different classes of lands, and not as narrowing the purview of (*a*). [Bonser, C.J.—Take (*d*), and the definition would run as follows : " Land at the disposal of the Crown means all land ...... not " registered as temple lands under Ordinance No. 10 of 1856." Could the Crown claim the house in which you are residing as land at the disposal of the Crown, because it was not registered as a temple land ? Or take (*c*), and the definition would run as follows : " Land at the disposal of the Crown means all land .... " in respect of which no person has acquired a right as against the " Crown by the issue to him of any certificate of no claim by the " Crown," &c. Would this entitle the Crown to claim your residence as land at its disposal, because you have not acquired it under the certificate mentioned ?] In neither case could the Crown claim my residence, as my title to it rests on a Crown grant, which falls within (*b*). The intention of the Legislature was to describe four classes of lands as comprehended in the expression " land at the " disposal of the Crown." That intention has been inartistically expressed, being open to the *reductio ad absurdum* interpretation suggested. But that difficulty arises only when the clause is read too literally. On the other hand, it is impossible to construe " (*d*) " as a qualification or cutting down of " (*a*) " without adding many new words to " (*d*)."

Bonser, C.J.—I admit that difficulty.

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Rámanáthan.—Grammatically, then, the interpretation of the Court is inconclusive in regard to the theory that (*b*), (*c*), and (*d*) are qualifications of (*a*). By the word "means" the Legislature meant "includes," so that the definition would run as follows: "Land at the disposal of the Crown includes the different classes "of lands mentioned in (*a*), (*b*), (*c*), and (*d*)." [BONSER, C.J.—It has been held that "includes" signifies "has the following meanings in addition to its popular meaning," *13 L.R., Q.B., 195.*] It is submitted that "means" here signifies "includes" in its ordinary sense. But is it necessary to decide this question in the present case? If the Court holds that (*b*), (*c*), and (*d*) are qualifications of (*a*), it is submitted that the onus of proving the negative facts contemplated by (*b*), (*c*), and (*d*) does not lie on the Crown. There is evidence on record to show that the first accused ordered the clearing of the land.

1895.
July 11.

11th July, 1895. BONSER, C.J.—

In this case the appellants were found guilty of "clearing a land "at the disposal of the Crown, to wit, Galpilleheressa, for chena "cultivation, without a permit from the Government Agent of "the Province or the Assistant Agent of the district, in breach "of rule 1 of the rules framed under chapter IV. of Ordinance "No. 10 of 1885, as prescribed by the Government Agent of the "Province and approved by the Governor, with the advice of the "Executive Council, published in *Gazette* No. 4,915 of March 22, "1889, and thereby committing an offence punishable under "section 42 of Ordinance No. 10 of 1885," and the first appellant was sentenced to pay a fine of Rs. 30, or in default to undergo one month's simple imprisonment, and the second appellant was fined Rs. 5.

The first appellant is the owner of a tea estate near Undugoda, and he has recently cleared some land, on which forest trees were growing, which adjoined his estate. The second appellant was a contractor whom the first appellant employed to clear the land in question. There is no evidence as to the purpose for which the land was cleared, except that one of the witnesses for the prosecution stated that when he inspected the land the first accused was opening up a road. It appears from the evidence that the accused's land is planted with tea, and one might assume that the adjoining land was cleared by him to be used for a similar purpose. As I said before, there is no evidence which points to

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1895. July 11. BONSER, C.J.

the purpose for which the land was cleared, except to be used for a road. Now, what the regulation which he is charged with infringing forbids is "clearing land at the disposal of the Crown for "*chena cultivation.*" Therefore, the purpose for which the clearing is made is part of the offence. Clearing by itself without a permit is not made an offence by any rule; it is clearing for a particular purpose, and that purpose not having been proved here the conviction cannot be supported.

The Solicitor-General, who appeared to support the conviction, admitted that it could not be supported owing to another difficulty, and that was, that there was no evidence that the land cleared was not within a reserved forest, for if it was within a reserved forest the regulations would not apply. But there was another difficulty, namely, that it is not proved that this land was land at the disposal of the Crown. Section 3 of Ordinance No. 10 of 1885 defines the expression "land at the disposal of the Crown" to mean all land, and then there is a dash and four clauses, each headed by a letter. The Solicitor-General said that the land in question came within clause (*a*) of the definition, as being land which, under Ordinance No. 12 of 1840, section 6, was presumed to be the property of the Crown until the contrary be proved; in other words, that it was forest, waste, unoccupied, or uncultivated land; and he further contended that these clauses (*a*), (*b*), (*c*), and (*d*) were to be considered independently, and that it was sufficient if you found any land that answered the description given in any one of those clauses. But it appears to me that that is an impossible interpretation of the clauses. Apply that interpretation to clause (*d*). If that clause is to be read independently, the section would read—"land at the disposal of the Crown" means all land not registered as temple land under Ordinance No. 10 of 1856. Now, it is a well-known principle of interpretation that where the word "means" is used in an interpretation Ordinance it signifies that the word defined is to have that meaning, and no other. The result, therefore, would be that, once you found land was not registered as temple land, it was for the purpose of that Ordinance "land at the disposal of the Crown." That is an impossible interpretation. In the same way take clause (*c*), and we arrive at an equally absurd result if we interpret that independently, for then we should have a definition of "land at the disposal of the Crown" as referring to "all land in respect of which no person has "acquired a right as against the Crown by the issue to him of a "certificate of no claim by the Crown under Ordinance No. 12 of "1840 or No. 1 of 1844." It seems to me that the only way of reading the interpretation clause, so as to make intelligible sense, is to

read clauses (*b*), (*c*), and (*d*) as cutting down the generality of the definition contained in clause (*a*), so that the meaning would be that " land at the disposal of the Crown " means all forest, waste, unoccupied, or uncultivated land, which has not been expressly granted away by the Crown (clause *b*), or in respect of which the Crown has not waived its right by issuing its certificate of non-claim (clause *c*), or which has not been registered a temple land (clause *d*). But it is not necessary to decide the meaning of " land " at the disposal of the Crown " in this case. I have expressed my present opinion of its meaning, but I am open to re-consider my opinion at any time on further argument.

The Solicitor-General asked that the case may be sent back for further evidence. The case stands thus. The defendant claims to be the owner of this land, and he produced a conveyance of the land to himself made just before the clearing operation. There was also some evidence that the land or a portion of it had been cultivated in years gone by. The evidence as to the ownership of the land called on behalf of the prosecution was of the vaguest nature, merely consisting of an assertion by a number of witnesses that the land was Crown land. Having regard to all the circumstances of the case and to the fact that, if the defendant has been acting illegally, the Crown has its civil remedy, I do not think it proper to send the case back as the Solicitor-General asks may be done, and I therefore quash the conviction and acquit the accused.

Accused acquitted.

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1895.

QUEEN *v.* SUSE TISSERA *et al.*

D. C., Chilaw (Criminal), 2,459.

Trial of criminal case—Irregular reception of evidence—Consent of parties.

In a criminal case it is irregular to import into it and consider as evidence the evidence taken and recorded in another case, though the complainants therein were the accused in the former case.

Consent thereto, on the part of the parties to the counter-cases, will not avail to render irregular proceedings regular.

THIS was a case in which seven persons were indicted for rioting, and three of them for voluntarily causing hurt. After the evidence for the prosecution and the statements of the accused, there followed in the record "for defence" the evidence of five witnesses on oath, two of whom appeared to be persons who were on their trial in this case.

On appeal against a conviction, his lordship the Chief Justice inquired under what circumstances the two accused gave their evidence for themselves on oath.

Dornhorst, for the accused, and *Rámanáthan, S.-G.*, for the Crown, agreed that a reference should be made to the District Judge.

His reply to the Registrar was as follows :—

With reference to your letter No. 299 of the 6th instant, I have the honour to inform you that the accuseds were prosecutors in counter-case No. 2,460, and that they desired to base their defence on the evidence for the prosecutions therein recorded. I accordingly took steps to have that evidence recorded again for the evidence in the present proceedings, deeming it just that the gist of the two counter-charges should be fully set out in one record.

The case was set down for argument, and the same counsel appeared.

1st July, 1895. BONSER, C.J., after stating the facts of the case as given above, said :—

The Acting District Judge (Mr. Thorburn) says he took steps to have the evidence of the accused again recorded for the defence in the present proceedings. As far as I understand, the steps consisted of having the evidence in the other record copied in this record. It may be said that the accused were not prejudiced by this proceeding, but this Court has always held that it is of the greatest importance that the proceedings, especially criminal proceedings, should be conducted regularly and according to law, and that consent will not avail to render irregular proceedings regular.

I think that the proper order to make will be to quash the conviction and remit the case to be re-tried.

Ordered accordingly.

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CAYLEY, Q.A., v. KERR.

1878.
Sept. 17.

D. C., Colombo, 1,629.

Shipping—Liability of master for non-delivery of goods received on board—Bill of lading unauthorized by master—Receipt of goods by chief officer as part of ship's cargo—Implied contract between master and consignor—Action by consignee—Evidence.

The master of a ship has the whole conduct and management of the ship and everything on board in his charge and custody.

If he is not himself the owner of the ship, he has this conduct, management, and custody as agent of the owner.

The chief mate of the ship is the master's hand or servant to receive on board for him goods into his custody, but is not generally authorized to bind him by special promises.

Where, in a suit brought against the master of a ship for recovery of damages consequent upon non-delivery of goods received on board by his chief mate, it was proved that G. H. S. & Co., professing to act for the master (but without due authority), acknowledged in a bill of lading that C. A. had shipped certain goods to be delivered at the port of Colombo unto O. A., and it appeared that the chief mate of the ship had received the goods in question on behalf of the master from a Dock Company in London without instructions as to their destination, or to whom they were to be delivered in Colombo,—

Held, that the master was not liable to O. A. on the bill of lading, or upon the implied contract created by the chief mate's acceptance of the goods on board, in the absence of proof that the Dock Company had contracted on behalf of O. A.

THE Queen's Advocate (the Hon. Mr. Cayley), by his information, gave the Court to understand that the defendant above-named, being master of the ss. *Eldorado*, received on board in London on 28th February, 1877, an iron girder of the value of Rs. 835 belonging to the Government of Ceylon in good order and condition, and agreed to deliver it in like good order and condition (certain perils and casualties only excepted) to the Government of Ceylon or their assigns in Colombo ; that the said girder was duly delivered to and received by the defendant in good order and condition, and the delivery of the same in Colombo to the Government of Ceylon or their assigns in like good order and condition was not prevented by any of the perils or casualties aforesaid ; and all conditions were fulfilled, &c., to entitle the said Government of Ceylon to have the said girder delivered to them at Colombo, and yet it was not so delivered, but was wholly lost to them to the damage of Rs. 835. The plaintiff prayed for such damages.

Though no mention was made in the information of a bill of lading, the defendant in his answer denied that he "signed the

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"bill of lading in the libel declared upon," and said, by way of demurrer, that "the plaintiff cannot have and maintain this action "against him." The defendant further said that, if the defendant and his servants were liable at all upon the bill of lading, they were liable only for the safe carriage of the said goods till they should be placed in the tackles of the vessel and delivered therefrom, and that the defendant was not responsible for the reception into the cargo boat of the goods in question, which were effected at the risk of the plaintiff, and that the loss in the libel alleged occurred after the girder left the tackles of the vessel, and that therefore the defendant was not liable. He further pleaded that under the exception in the said bill of lading contained, he was exempted from all liability in respect of loss or damage occasioned by the act of God or the perils and dangers and accidents of the sea, and that the loss of the said girder was occasioned by such perils, dangers, and accidents, and by the carelessness and negligence of the plaintiff's servants.

After argument had on the demurrer, the defendant was allowed to amend his answer by adding a denial that he received or agreed to deliver the girder as set forth in the information, and the parties proceeded to trial.

The bill of lading acknowledged that the Crown Agents for the Colonies had shipped in good order and condition certain goods, including the girder which was the subject of dispute in the present case, &c., "to be delivered, subject to the conditions and "exceptions hereinafter mentioned, in the like good order and "condition from the ship's tackles [where the ship's responsibility "shall cease] at the port of Colombo ...... unto the Officer Adminis- "tering the Government of Ceylon, &c. In witness whereof the "master of the said ship has signed three bills of lading ...... "For the master, Gellatty, Hankey, Sewell & Co., *per* P. MacSewell, "Agents."

It appeared in evidence that the defendant did not expressly authorize Gellatty, Hankey, Sewell & Co., or the ship's agents, to bind him by their signature to a bill of lading executed in England, but that the chief officer of the *Eldorado*, whose duty it was to receive cargo on board, had received the goods in question on behalf of the master, and that the girder slipped from the sling while being hoisted over the ship's side and fell into the cargo boat slantingly, and rolled out of it into the sea owing to a heavy swell.

The learned District Judge found that there was no evidence to connect the defendant with the bill of lading, and that there was no written document of any kind between the parties. He

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held that there was an implied agreement on the part of the chief officer acting for and in behalf of the master to deliver to the plaintiff the girder actually received by him as cargo for freight, and that though the girder fell into the boat "clear of the ship's "tackle," it was not such a delivery as to enable the plaintiff in the circumstances of the case to receive it, and that the loss consequent upon such impracticable delivery should be borne by the defendant, especially as there was no proof that the plaintiff's servants were either careless or negligent. He also found that the loss was not occasioned by the dangers and perils of the sea, because though there was a pretty good swell on, which caused the cargo boat into which the girder had fallen to partially capsize, yet the loss of the girder was due simply to its slipping from the slings from want of care either in securing it to the slings or in lowering it. He accordingly gave judgment for plaintiff as claimed.

On appeal by defendant, *Layard* appeared for him.

R. H. Morgan, for plaintiff respondent.

Cur. adv. vult.

17th September, 1878. PHEAR, C.J.—

This action is brought on behalf of the Crown against the defendant, Kerr, who is described in the information or libel as master of the steamship *Eldorado*.

The information states that the defendant received on board his steamer in London on the 28th February, 1877, certain goods belonging to the Government of Ceylon, to wit, an iron girder marked C Λ △ of the value of Rs. 835·73, in good order and condition, and did promise and agree to deliver the said iron girder in like good order and condition (certain perils and casualties only excepted) to the Government of Ceylon or their assigns in Colombo. And it goes on to complain that, although all things had happened to entitle the Government of Ceylon to have the said iron girder delivered to them at Colombo in good order and condition, yet the said iron girder was not so delivered, but was wholly lost to the Government. And the plaintiff claimed as damages Rs. 835·73.

It is not a little remarkable that this information omits to state to whom the defendant's promise, which is the ground of suit, was made. And it can hardly be assumed that the omission was accidental, because the whole gist of the matter in issue between the parties lies at this point.

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1878.

PHEAR, C.J.

The answer of the defendant, as at first filed, was no answer at all. It assumed that the contract or promise relied upon by the plaintiff was contained in an unmentioned bill of lading, and then proceeded both to demur and also to deny all liability under this imaginary bill of lading.

It is much to be deplored that such an example as this of loose and inaccurate pleading is to be found constituting the original structure of a not unimportant mercantile suit in the principal District Court of this Colony.

At the trial the answer was amended by the addition of the traverse: "The defendant denies that he received, or promised, "or agreed to deliver the goods in the libel mentioned as in the "libel alleged." And I suppose it was taken as understood that the promisee of this promise set out in the information was intended by the person who drew the information to be the plaintiff.

It is conceded on the part of the plaintiff that this promise was not put into writing, and that it was not actually *expressed* by the defendant in any other way. The case of the plaintiff is, that it is to be inferred or implied from the facts which occurred in reference to the shipment of the girder.

These facts, so far as they are material, seem to be that the defendant was master of the ss. *Eldorado* when she was in the course of being loaded in the docks of some unnamed Dock Company in London, probably in August, 1877; and that the girder was then and there received on board the vessel by the chief mate in the manner described by him as follows:—

It was my duty as chief mate to receive the cargo on board. In the course of my duty I received goods shipped on behalf of the Crown Agents to be cargo on the voyage in question for freight; and among these goods I received the girder in question, acting on behalf of the master.

To the Court he said:—

It is almost invariable that the chief mates receive the cargo, acting in so doing on behalf of the masters of ships.

On cross-examination he said:—

The girder came to the ship in a lighter, and as a rule the Dock Company at London receive the greater part of the cargo and get it put on board. The Dock Company sends a clerk on board, but only to keep a tally of what the Company puts, and the chief mate receives, on board. I had no communication with the defendant in regard to the girder, nor did he ask me to take it on board. I gave a receipt to the Dock Company for the cargo they delivered to me. I am certain of this.

The master himself, when examined as a party not on oath, said:—

Before sailing I knew from the ship's owner's agents in London that there were Government goods on board shipped on behalf of the Crown

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Agents, and to be delivered to the Government here. It was not till the day of the accident to the girder in question that I knew that particular article had been on board.

This is all the evidence in the case bearing on the issue between the parties; and it is unfortunate that it should be so indefinite as it is.

When the chief mate says, "I received the girder acting on "behalf of the master," adding the explanation, "it is almost "invariable that chief mates receive the cargo, acting in so "doing on behalf of the masters of ships," I do not understand him to mean that he had any special agency authority to bind the defendant. On the contrary, I understand him simply to convey: "I only acted in this matter for the defendant, as it is "the duty of all chief mates to act for their respective masters." The master has the whole conduct and management of the ship, and everything on board is in his charge and custody. If he is not himself the sole owner of the ship, then he has this conduct, mangement, and custody as agent of the owner or collective owners. The chief mate is thus the master's hand or servant to receive for him goods into his custody on board the ship, but is not generally authorized to bind him by special promises. In the present case the utmost that can be gathered from the evidence is, as it seems to us, that the girder came into the custody of the defendant on board the *Eldorado*, in some docks in London, through the hands of the chief officer of the ship, to be carried probably to, and to be delivered over the ship's side to somebody at, Colombo. How its destination was originally made known does not appear; and to whom the effort to deliver at Colombo, which the mate describes was made, is not disclosed. All that can be legitimately inferred from these facts is, I think, a promise by the defendant to the person from whom the girder was in fact received on board to carry it and to deliver it, in like condition as it was received, to some consignee at Colombo. If we assume that the plaintiff was that consignee, still it seems tolerably clear that the person from whom the girder was actually received, and to whom therefore in the absence of anything expressed on the point the implied promise was primarily made, was the Dock Company, whoever this may be. Possibly, as the chief mate himself seems to have thought, the Company acted in the matter of putting the goods on board for the Crown Agents, and so third hand (so to speak) for the plaintiff in this suit. In other words, it may be the case that the Crown is entitled to claim the benefit, as principal of the implied promise, which seems from the facts to have been made by the defendant to the Dock

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1878.

PHEAR, C.J.

Company, by showing that the Dock Company made the contract on its behalf. But nothing of the kind has been attempted. And it seems to us on the whole that the plaintiff has quite failed to prove that the defendant ever made with him, the plaintiff, the promise or contract of carriage on which the information is based.

With this view of the case, we think the decree of the District Court is wrong, and ought to be set aside, and that the plaintiff's suit ought to be dismissed.

1895.
June 18 and July 8.

SITHAMBARAPPILLAI *v.* VINASITAMBY *et al.*

D. C., Jaffna, 24,691.

Rei vindicatio—*Alternative decree for delivery of articles or payment of their value—Action of detinue—Civil Procedure Code, ss. 191, 320, and 321.*

Where, in an action raised for specific delivery of certain articles wrongfully detained, or for payment of their value, defendant admitted possession of some of the articles and claimed a certain sum of money from the plaintiff on a separate account, and the Court decreed that defendant do return to the plaintiff the articles admitted by him, or pay plaintiff their value, and that defendant do further pay plaintiff Rs. 25·50, being the difference between the value of certain articles claimed by plaintiff and the amount found to be due by plaintiff to defendant—

Held, that such a decree was unworkable and irregular.

Held, also, that in an action *rei vindicatio* for recovery of specific movable property, an alternative decree for payment of its value is bad.

The English action of detinue is inconsistent with sections 320 and 321 of the Civil Procedure Code and section 191 does not authorize the alternative form of decree entered.

THE plaintiff complained that certain jewels and other goods belonging to the estate of his deceased wife, specifically described and valued in the schedule annexed to the plaint, were wrongfully detained by the defendants, and he prayed that "the "defendants be decreed to restore and deliver to the plaintiff, as "administrator of his deceased wife, the several jewellery, goods, "and chattels declared in the schedule marked A, or to pay the "plaintiff, as such administrator, the sum of Rs. 985 if such "possession cannot be had."

The defendants admitted plaintiff's right to six out of the nineteen jewels named in the plaint, and claimed payment of Rs. 165, being medical and funeral expenses they had incurred on account of the deceased.

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The District Judge found that plaintiff was entitled to receive not only the six articles admitted by the defendants, but three others also, which latter were valued at Rs. 25·50. He further found that defendants had made good their claim for funeral expenses for Rs. 49·46, but not for medical expenses. 1895.

Plaintiff appealed.

Sampayo (with him *Pereira* and *Senáthi Rája*), for appellant.

Rámanáthan, S.-G. (with him *Dornhorst* and *Bawa*), for defendants respondent.

The case was argued on the merits on 18th June, 1895, and judgment reserved.

On a subsequent day their Lordships desired to hear counsel on the form of the decree entered by the District Judge, which ran as follows :—

It is decreed that the defendants do return to the plaintiff the following articles described in plaintiff's list A, and which defendants admit they are in possession of, viz., article No. 1, táli, worth Rs. 234 ; article No. 3, a pair of thòdu, worth Rs 50, &c. . . . . . . or pay plaintiff the value of each such article.

It is also decreed that the defendants do pay to plaintiff Rs. 25·50, the difference between the value of articles Nos. 2, 6, and 8 described in the plaintiff's list A, and Rs. 49·46 the funeral expenses incurred by the defendants.

Parties will bear their own costs.

BONSER, C.J.—What authority is there for an alternative decree for specific delivery of the articles named, or payment of their value, in an action like the present, which is *rei vindicatio ?* Such a decree appears to be inconsistent with sections 320–322 of the Civil Procedure Code.

Sampayo referred to section 191 of the Ceylon Civil Procedure Code and 208 of the Indian Procedure Code.

BONSER, C.J.—But there is no provision in our Code to give effect to section 191, whereas in the Indian Code there is provision to give effect to section 208. It seems to me that section 191 and sections 320–322 of our Code are inconsistent, and that section 191 has been inserted inadvertently.

Rámanáthan.—The words of section 191 are imperative : " when " the action is for movable property, if the decree be for the delivery " of such property, it *shall* also state the amount of money to be " paid as an alternative, if delivery cannot be had." Plaintiff prayed for such a decree, and the District Judge decreed accordingly. Our Courts have long been used to such alternative decrees in cases of *detinue*. In *D. C., Mátara, 33,573*, decided on the 24th February, 1885, BURNSIDE, C.J., recognized such decrees. So WITHERS, J.,

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1895. *July 8.* in *C. R., Avisáwélla, 4,116, Civil Minutes, 4th December, 1,894.* The Civil Procedure Code, section 191, simply conserved the law in existence at the time the Code was enacted. [BONSER, C.J.—But, how will you give effect to such a decree in view of sections 320–322 ?] If the alternative decree appears on the face of the writ, the Fiscal will not enforce specific delivery in the event of the execution-debtor refusing to deliver, but will enforce the decree for the value of the articles as a money decree. By this means section 191 may be worked harmoniously with sections 320–322.

Cur. adv. vult.

8th July, 1895. BONSER, C.J.—

We had this case placed in the paper for further argument with regard to the form of the decree, and after hearing the Solicitor-General and Mr. Sampayo, I am of opinion that this decree must be amended by inserting the three articles of jewellery, Nos. 2, 6, and 8, in the plaintiff's list amongst the things to be given up, and also by ordering the plaintiff to pay the defendant the amount found due for funeral expenses. The Judge has, for what reason I know not, assumed that the defendant will not give up these three articles, and has set off their value against the funeral expenses, giving judgment only for the balance. That is an unworkable form of decree, because, if the Fiscal seizes the articles or the defendant gives them up, then there is no order on the plaintiff to pay the amount which the Court has found to be due to the defendants on account of the funeral expenses. Moreover, the words "or pay the plaintiff the value of each article" must be struck out, for this is an action for the recovery of specific movable property, and sections 320 and 321 of the Civil Procedure Code lay down clearly what is to be done under such a decree. A difficulty has been raised by the provision of section 191 of the Civil Procedure Code that "when the action is for movable property, if the decree "be for the delivery of such property, it shall also state the amount "of money to be paid as an alternative, if delivery cannot be had," which is apparently inconsistent with the provisions of sections 320 and 321, but, in my opinion, whatever section 191 means, it does not authorize such a decree as was made in this case. The decree follows the form of judgment in the old English action of detinue, which gave the person detaining the goods the option of giving them up or keeping them on paying their value. That was a very imperfect form of relief, and it was found necessary to amend it subsequently by the Common Law Procedure Act. It was suggested by the Solicitor-General that the effect of section 191 is to recognize and approve the introduction into the colony of the English action of detinue; but the words

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of that section are quite insufficient for that purpose: it does not say that the decree is to state the amount of money which is to be paid as an alternative if the defendant declines to give up the things and wishes to keep them. It is the amount to be paid if delivery cannot be had, *i.e.*, if the Fiscal under his warrant is unable to get the things back, if they have gone out of his jurisdiction, or have ceased to exist, or there is any other equally valid reason. These words lend no colour to the suggestion that the defendant is at liberty to say, "I will keep the things, and you "cannot take them from me if I submit to pay the amount found "due." So, whatever be the effect of section 191, it, in my opinion, does not justify the decree made in this case.

1895.

BONSER, C.J.

The decree should be amended in the way I have pointed out, leaving it to be executed in the manner pointed out by sections 320, 321, and 322 of the Civil Procedure Code.

At present it is unnecessary to determine what is the effect of the valuation ordered to be made under section 191. If section 191 is inconsistent with section 322, the latter is later, and must govern. But that question will only arise when the decree is executed, and the delivery of the goods cannot be effected.

BROWNE, A.J., agreed.

[See *Sheik Ali v. Carimjee Jafferjee*, reported below.]

SHEIK ALI *v.* CARIMJEE JAFFERJEE.

1895.
June 25 and July 9.

D. C., Colombo, 4,850.

Rei vindicatio—*Form of decree—Detinue—Civil Procedure Code, ss. 191, 320–322.*

Though in an action of detinue decree for delivery of the articles claimed or payment of their value is admissible, yet such an alternative decree is not regular in an action *rei vindicatio*, the question of compensation arising only when it is ascertained that the property could not be restored, and the amount of compensation being dependent on the conduct of the defendant.

Per BONSER, C.J.—Sections 320–322 of the Civil Procedure Code seem to be in accordance with the Roman-Dutch Law and practice, and section 191 should be disregarded as being inconsistent with the later portions of the Code.

Sithambarappillai v. Vinasitamby (*ante*, page 114) followed.

IN this action plaintiff prayed that the defendant may be ordered to deliver to him three cases of tortoise-shells belonging to the plaintiff and wrongfully detained by the defendant, or to pay to the plaintiff the value thereof. He prayed also for damages.

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1895. Defendant claimed the goods as his own, but the District Judge entered a decree for plaintiff for the return of the cases, "and in "default of delivery the defendant do pay to the plaintiff the value "thereof, namely, the sum of Rs. 9,000," and Rs. 900 as damages.

On appeal, *Layard, A.-G.* (with him *Dornhorst, Morgan, Dumbleton,* and *Van Langenberg*), appeared for the defendant appellant.

Rámanáthan, S.-G. (with him *Sampayo* and *Senáthi Rája*), for plaintiff respondent.

The Supreme Court affirmed the judgment of the Court below on the merits, but amended the decree by striking out the words "and "in deafult of delivery the defendant do pay to the plaintiff the "value thereof, namely, the sum of Rs. 9,000."

Cur. adv. vult.

9th July, 1895. Bonser, C.J.—

The plaintiff is entitled to a decree for the delivery up of these goods.

I observe that the decree, after ordering the delivery of the three chests, proceeds thus: "and in default of delivery the defendant do "pay to the plaintiff the value thereof, namely, the sum of Rs. 9,000." As we held yesterday in the Jaffna jewel case (*Sithambarappillai v. Vinasitamby*, reported *ante*, p. 114), this is not a correct form of decree, for it gives the defendant the option of delivering the goods or paying their value. This is in accordance with the English practice in actions of detinue, but it does not appear to be proper in an action *rei vindicatio*. The object of that action is to recover the specific property. Sections 320–322 of the Civil Procedure Code show how a decree for a specific movable is to be executed. The Court will issue on the plaintiff's application a writ in form No. 62 in the second schedule. Armed with this writ the Fiscal is to seize the movable if the judgment-debtor does not deliver it up on demand. If the Fiscal is unable to execute this writ he makes a return to the Court accordingly, and then the Court, on the application of the plaintiff, will order a second writ to issue for seizure and sale of the judgment-debtor's property, or a warrant of arrest of his body, or both. The amount of money for which the second writ is to issue is to be "the amount of pecuniary loss, as nearly as "the Court can estimate it, which is occasioned to the judgment-"creditor by reason of the judgment-debtor's default in making delivery, and which the Court shall award by way of compensation "to the judgment-creditor *by the order directing the writ to issue*."

It will be seen that this gives no option to the judgment-debtor to retain the goods on paying the value. The Fiscal is to do his best to obtain delivery of the goods, and it is only in the event of

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his being unable to obtain such delivery that compensation is to be awarded to the plaintiff, and this compensation is not to be awarded by the decree, but by the order which directs the second writ to issue.

This procedure is in accordance with the Roman-Dutch practice (Voet VI., 1, 30–34).

A difficulty is raised, however, by section 191 of the Civil Procedure Code, which provides that " when the action is for " movable property, if the decree be for the delivery of such property " it shall also state the amount of money to be paid as an alternative " if delivery cannot be had." But the words " if delivery cannot " be had " do not afford any foundation for such a decree as was made in the present case. They cannot be read as though they were " if the defendant declines to give up the property."

The explanation is probably this: section 191 is taken bodily from the Indian Civil Procedure Code, being there section 208, whereas sections 320–322 have no counterpart in the Indian Code.

Even according to the English practice there should have been a finding as to the value of each chest. For the defendant might have made away with one of them and be willing to give up the others. But I am inclined to think that section 191 must be disregarded as being inconsistent with the later portions of the Ordinance, and inapplicable to an action *rei vindicatio.*

The procedure laid down in sections 320–322 seems to be in accordance with the Roman-Dutch Law and practice, according to which the question of compensation would only be assessed after it had been ascertained that the property could not be restored. *Verum si ex adverso rei restituendæ facultatem reus non habeat videndum an dolo ac culpâ ejus an casu id contigerit* (Voet VI., 1, 32). The amount of compensation varied according to the conduct of the defendant, for, as Voet goes on to state, if the defendant had ceased to possess *dolo*, he must pay the value sworn to by the plaintiff; whereas if he was guilty only of *culpâ* he paid the actual value, not the value *ex affectione vindicantis.* If the loss were accidental in some cases he would not be liable to make good the value.

The decree therefore should be varied by striking out the words to which I have referred.

Form No. 62 gives no direction as to levying the costs of the action, but there is no reason why a separate writ should not be issued for the damages and costs, together with the writ for delivery.

Browne, A.J., concurred.

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1889. *August 16.*

ANTHO PULLE *v.* CHRISTOFFEL PULLE.

D. C., Colombo, 444.

Trustee and cestui que trust—*Prescription—Ordinance No. 22 of 1871.*

A trustee receiving money on behalf of his *cestui que trust* cannot set up a plea of prescription in bar of the claim of such *cestui que trust.*

THE plaintiff, as executor of the last will and testament of one Lucia Ferdano, deceased, sought to recover from the defendant, as trustee of the said Lucia Ferdano, a certain sum of money, alleging in paragraph 11 of his libel that the defendant had on the 31st October, 1881, filed a final account in testamentary suit No. 3,541 of the District Court of Colombo, wherein he declared that he held in his hands in trust for the said Lucia Ferdano a balance sum of Rs. 8,430; in paragraph 12, that he did not pay this amount to her during her lifetime or to her executor, the plaintiff; in paragraph 14, that he held the said amount in trust for the estate of the said Lucia Ferdano; and in paragraph 15, that the defendant promised to pay the plaintiff the said sum with interest, but failed to do so.

The facts of the case in detail are set forth in the judgment of Mr. Justice Clarence.

Defendant pleaded, *inter alia,* that the cause of action, if any, alleged in paragraph 11 of the libel, and in paragraph 15 thereof, if the alleged promise be in writing, did not accrue within six years before the commencement of this suit (filed on 24th September, 1888); and the cause of action, if any, alleged in paragraphs 12 and 14 of the libel and in paragraph 15 thereof, if the alleged promise be verbal and a cause of action, if any, for moneys had and received to the use either of the plaintiff's testatrix or the plaintiff, did not accrue within three years before the commencement of this suit.

The District Judge upheld the plea of prescription and dismissed plaintiff's action.

On appeal, *Dornhorst* (*Wendt* with him) for appellant.

Layard, S.-G. (*Fisher* with him) for respondent.

Cur. adv. vult.

16th August, 1889. CLARENCE, J.—

In 1868 Anthony Jury and his wife Lucia made a joint will, the provisions of which, so far as is now material, were as follows:— They directed that all their property, movable and immovable, should be under the "power and control of the survivor for life, "and that he or she should possess and enjoy the same with all the "issues and rents and profits thereof." The 14th clause of the will

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further directed that the rents and profits of certain properties therein mentioned should be "collected and recovered" by the testator's brother's two sons, Miguel Jury and the defendant, and paid to the testatrix monthly, and the will reserved to her a power, which she never exercised, of appointing some one else in their room in the event of their neglecting their duties. The will further appointed three executors, viz., plaintiff, defendant, and Miguel Jury. The testator died in 1869 leaving the testatrix surviving him, and the will was proved by the three executors. Miguel Jury died in 1872. The testatrix Lucia died in 1873, leaving will by which she gave all her property to the plaintiff and appointed him sole executor. Plaintiff delayed until 1888, and then obtained probate of the will.

He now sues the defendant claiming to be entitled to recover from him a sum of over Rs. 8,000, which he avers to be due from defendant to the estate of Lucia in respect of income of properties subject to the provisions of the joint will. The 7th and 9th paragraphs of the libel are not very explicit in distinguishing between the income of property subject to the provisions of the 14th clause of the joint will, as to which defendant and Miguel Jury were trustees, and subject to the general provisions of the will in favour of Lucia. But the gist of plaintiff's averments seems to be, that between the death of the testator and the death of Lucia the income of the joint estate amounted to Rs. 11,199·25, and deducting sums said to have been received by Lucia during her lifetime, the plaintiff charges that there is a balance due to Lucia's estate of over Rs. 8,000, which he says has never been paid, and is in defendant's hands.

There is a general averment in the 14th paragraph of the libel that the Rs. 11,199·25 above mentioned was received by defendant and Miguel Jury as trustees for Lucia. The libel further alleges that defendant, in an account filed in the "testamentary matter" of the joint will, admitted this indebtedness, and that he promised to pay plaintiff the balance which plaintiff now claims, and that he never did pay.

The defendant, in answer to this libel, sets up defences of *non accrevit infra sex annos* and *non accrevit infra tres annos*, and (as I understand the answer) denies that defendant "collected" the balance sum now claimed, and denies making any admission or promise as alleged.

At the hearing the plaintiff went into the witness-box and made a rather confused statement, intended apparently to suggest that the defendant had in his hands the money now claimed, but by no means distinctly expressing anything.

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1889. CLARENCE, J. The learned District Judge held that "plaintiff" had proved nothing, and also upheld the defence of prescription. He dismissed the suit with costs.

So far as concerns the defence founded on the Prescription Ordinance, I cannot uphold the judgment. Plaintiff avers that the money which he claims was received by defendant as trustee for Lucia, and if defendant as trustee under the 14th clause of this joint will received income which it was his duty to pay to Lucia, his *cestui que trust*, he cannot, in my opinion, thus set up the Ordinance in bar of the claim of his *cestui que trust*. If authority be needed for this we may find it in *Burdick v. Garrick, L. R. 5, ch. 233*, and *Lake v. Bell, L. R. 34, ch. D. 462*. It was then suggested for the defence that the action should be regarded as an action on account stated, meaning the account already referred to as filed in certain testamentary proceedings. I do not at all, however, view the action as one upon account stated, but as a suit to recover a sum claimed as due by trustee to *cestui que trust*. Reference was also made in the course of argument to the promise alleged as made by defendant, and the case of *Roper v. Holland, A. and E.*, was refererd to. I do not think that case touches this case. There may be cases in which the relationship of trustee and *cestui que trust* has come to an end, in which the two parties have come to stand at arm's length, and money which originally accrued under the trust remains in the hands of the whilom trustee in another character than that of trust money. In such a case, no doubt, the statutory term might begin to run from the time when the parties ceased to stand to each other in the character of trustee and *cestui que trust*. I say there may be such cases possibly, but the present is not such a case. The court would certainly watch jealously any proposal to divert the trustee of his fiduciary character, and it is at any rate impossible to hold that the mere fact of a trustee promising to pay his *cestui que trust*, and then breaking his promise, could have any such effect.

The plaintiff's claim therefore has to be considered upon its merits, and as to that I do not dissent from the Chief Justice's proposal to send the case back to the District Court for trial on the merits. If the learned District Judge has expressly recorded that he disbelieved the plaintiff's statements in the witness-box, which are far from being very clear, I certainly, especially in view of the plaintiff's signal delay in taking probate of his testatrix' will, would not have undertaken to disturb the judgment for the defendant; but under the circumstances I am content that the case should go back to the District Court for trial, but I think plaintiff should have costs of this appeal.

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BURNSIDE, C.J.—

I am unable to agree with the judgment of the learned District Judge. The action is one brought by a *cestui que trust* to recover a sum of money due him under the trust from the trustee. The plaintiff alleges that a certain definite sum is in the defendant's hands, and if he has proved what he alleged, I cannot see any obstacle whatever to his recovering it in this suit. It is true that *cestui que trust* could not sue his trustee at law except in the cases like *Roper v. Holland, 3 A. and E.*, but was compelled to resort to his equitable action of account; but our Courts administer equity as well as law, and I am not aware that in an equitable action a *cestui que trust* could not recover if he alleged, and was able to prove an exact sum due to him without the taking of any accounts. Upon the plea of prescription, the defendant must fail. No proposition is better established than that prescription does not run between trustee and *cestui que trust.* But upon the main issue between the plaintiff and defendant, I think the plaintiff has established a *primâ facie* case to recover the specific amount mentioned, Rs. 8,430·88, with interest. The District Judge has said that the plaintiff has proved nothing. If the District Judge means that the plaintiff has given no evidence bearing on the question, then it seems he has overlooked material parts of the plaintiff's evidence. If he means that what the plaintiff has sworn to is of no probative value, he is mistaken. The joint account of the executors of Anthony showed a balance in the hands of both the executors to the amount mentioned. The plaintiff in his evidence says it was the defendant who had it. Now, if this be true, it establishes that that sum had come to the hands of the defendant for his *cestui que trust,* and the plaintiff's right to receive it is clear. As the learned Judge has, however, miscarried on this point and on the issue of prescription, and perhaps the defendant was content to leave the case as the learned Judge had accepted it, I would send the case back in order that the real issue between the parties may be contested.

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1895. *July 1.*

VENASY *v.* VELAN *et al.*

P. C., Mallakam, 8,091.

Criminal Procedure Code, s. 226, s. 16 of Ordinance No. 1 of 1888, and s. 352 of the Procedure Code—Irregularity of deciding case upon evidence outside it.

The necessity for the framing of a charge by a Magistrate under section 226 of the Criminal Procedure Code does not exist in the case of a simple complaint, more or less in the words of a formal charge read and explained to an accused at the commencement of the trial and adopted by the Magistrate as his charge.

Failure to give an accused an opportunity to make a statement and to question him generally as to his defence, as required by section 352 of the Criminal Procedure Code and section 16 of Ordinance No. 1 of 1888, amounts to a fatal irregularity only if he were an ignorant and illiterate person and destitute of legal assistance at the trial.

Each case must be decided solely upon evidence recorded therein, without reference to any other case.

Tissera v. Foster (*9 S. C. C. 173*) distinguished.

THE facts of the case are stated sufficiently in the judgment of his Lordship the Chief Justice.

Blazé and *Aserappa*, for the appellant.

1st July, 1895. BONSER, C.J.—

This is an appeal from a conviction of Mr. Kathiravelupullai, Police Magistrate at Mallakam, on points of law.

He convicted the appellants of an assault, and fined them Rs. 10 and Rs. 5 respectively. They can only appeal on grounds of law.

The first objection is, that the Magistrate did not frame a charge.

What happened was this. A written plaint was filed by the complainant, charging the accused " with voluntarily causing hurt " and thereby committing an offence punishable under section 314 " of the Penal Code." That plaint was read over and explained to the accused at the commencement of the trial, but no fresh charge was framed by the Magistrate.

I cannot see that that was necessary. We have here in writing an accusation, which has all the requirements of a charge, and the Magistrate adopts that as his charge.

It is said that section 226 of the Procedure Code requires him to write that out again, and that there is a decision of this Court—*Tissera v. Foster, 9 S. C. C. 173*—which renders such a course necessary.

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But in that case, it will be seen, that the complaint was not a simple complaint like the one in the present case, but a complaint embodying charges under three different enactments. In that case the prisoner was found guilty of one only of the offences complained of. Again, the complaint was explained to the defendants on one day and the trial took place on a subsequent day.

That is quite a different case from the present, in which we have a simple complaint almost in the very words of a formal charge, and which is read over and explained to the prisoner at the commencement of the trial.

But, however that may be, whether *Tissera v. Foster* was rightly decided or not, or whether it can be distinguished from the present case, I am of opinion that there is not the slightest shadow of a reason for suggesting that the accused were in any way prejudiced by the omission, and therefore (whether the objection be a good one or bad one) I decline to set aside the conviction on that ground.

The next objection was, that the Magistrate did not observe the requirements of section 352 of the Code and section 16 of Ordinance 1 of 1888, that he did not give the prisoners an opportunity of making a statement, or question them generally as to their defence.

This, no doubt, was an irregularity, and, had the appellants been ignorant and illiterate persons without legal assistance, I think that the objection would have been a substantial one, but in the present cases the interests of the accused were protected by two legal practitioners who appeared for them. Under these circumstances I think that there is no ground for saying that the accused were prejudiced by the irregularity.

The third objection is this, that the trial having taken place on the 4th of May the Magistrate did not convict until the 11th of May.

Now, I have already stated in another case that I think it most desirable that Magistrates and District Judges should state their finding as to the guilt or innocence of the accused immediately at the conclusion of the trial, and that, if the impression left upon their minds by the prosecution, after hearing all the evidence, is so weak and unsatisfactory that they are unable to say whether they consider the accused to be guilty or not, they should give the accused the benefit of the doubt and acquit.

The Magistrate in this case has forwarded his explanation of the delay.

It appears that the 11th was the next Court day at Mallakam, and that he waited to give judgment until he had heard a connected counter case.

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It would appear from this that he did not decide the case on the evidence recorded in the case solely, but on that evidence combined with the evidence taken in some other proceedings. If that is so, the conviction cannot stand.

Cases must be decided on the recorded evidence without reference to other cases.

1895.
June 17.

RODGERS *v.* TINDALS.

Master attendant and tindals of boats—Departmental inquiry—Ordinance No. 6 of 1865, ss. 23 and 40—Prosecution of offences against Ordinance.

A master attendant acting under section 23 of Ordinance No. 6 of 1865 can only withdraw or suspend a license, but he is not empowered by the Ordinance to take evidence on oath in any departmental inquiry, or to impose a fine as the result of such inquiry.

All offences against the Ordinance being made cognizable by the Police Courts by section 40, they should be dealt with in a regular criminal proceeding before such courts.

THIS was an inquiry which the Acting Master Attendant professed to hold departmentally under section 23 of Ordinance No. 6 of 1865. It was due to a report made to him by the Harbour Police that the tindals of certain cargo lighters had gone alongside the ss. *Rohilla* before she was moored in her berth. On the day fixed for the inquiry the tindals were present, the report of the police was read to them, and they having denied the charge the Acting Master Attendant examined on oath some witnesses in support of the charge and made the following order :—" I find all the accused " guilty of going alongside the ss. *Rohilla* before she was moored and " impeding the pilot's movements in mooring the vessel. For this " misconduct the accused are fined Rs. 5 each, or in default their " licenses to be suspended for seven days.—F. O. Carter, Master " Attendant."

The tindals appealed on the footing that the order complained of was made by Mr. Carter in his capacity of Joint Police Magistrate of Colombo.

Dornhorst and *Bawa*, for appellants.

17th June, 1895. BROWNE, A.J.—

I think that the judgment of the Joint Police Court of Colombo, dated the 4th May, 1895, should be set aside, and the proceedings quashed as irregular.

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In forwarding the appeal lodged in these proceedings the Acting Master Attendant has indicated to this Court his own doubts whether these, what he has styled "departmental" proceedings, and professed to hold under section 25 of Ordinance No. 6 of 1865, are regular. It is very clear they are not.

1895.

BROWNE, A.J.

[After setting forth the facts of the case he continued] I do not see that Ordinance No. 6 of 1865 empowered the Master Attendant to take evidence on oath or to impose a fine. Section 23 empowers him only to withdraw or suspend a license, but his order to any such effect requires confirmation by His Excellency the Governor.

It was stated in argument that the misconduct of which complaint was made would constitute an offence under Port Rule No. 37 of 20th December, 1894. If it be so, prosecution to conviction and fine is authorized by section 34, and the provisions of section 40 would apply.

The Ordinance has clearly indicated that it is in such a regular criminal proceeding an offender should be charged, tried, and punished, and that by a Police Magistrate. These proceedings are an irregular attempt to arrive at this end under the guise of a departmental inquiry on oath by the Master Attendant, whereby possibly he might question the right of any person to appeal from his decision. In truth, however, it was a prosecution before the Joint Police Court, and in it the accused has not been charged with any statutable offence, nor regularly tried nor convicted. I hold the accused had right to bring the decision before this Court by appeal as he has done, and I order for these reasons that the proceedings be quashed.

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1895; June 21, 25.

CANDEPERUMAL *v.* SINNATAI *et al.*

ISMA LEBBE MARIKAR, Claimant and Appellant.

D. C., Batticaloa, 24,176, Interlocutory.

Bill of costs—Taxation—Civil Procedure Code, s. 214—Claim proceedings under s. 241—Determination of class.

The class of a claim proceeding under section 241 of the Civil Procedure Code is determined either by the value of the property claimed or the amount of the decree, whichever is the less, and the bill of costs of such proceeding should be taxed according to the class so determined.

Per BROWNE, J.—A Court has power under sections 244–246 of the Civil Procedure Code to make order as to payment of costs.

Adamjee v. Cadar Lebbe, D. C., Colombo, No. 98,031 (1 C. L. R. 66), distinguished.

THE facts of the case sufficiently appear in the judgment of their Lordships.

Dornhorst, with *Bawa*, for claimant appellant.

Sampayo, for respondent.

Cur. adv. vult.

25th June, 1895. BONSER, C.J.—

This is an appeal from the decision of Mr. Roosmalecocq, Acting District Judge of Batticaloa, as to the taxation of a bill of costs.

The Fiscal, in executing a writ of execution to enforce a decree for the payment of money made in an action of *Kaderamen Cander Permal v. Vaatipody Summattai, No. 24,176*, in the District Court of Batticaloa, seized a piece of land, which he reported to be of the value of Rs. 100.

The appellant claimed the land as his property, and the Fiscal, as required by section 241 of the Civil Procedure Code, reported the claim to the Court.

The appellant thereupon made an application in writing, intituled in the said action, for a day to be fixed for inquiry into his claim, and that the sale by the Fiscal might be stayed pending that inquiry. The Court upon that application made an order staying the sale, and proceeded to investigate the claim in the presence of the execution-creditor and the claimant in a summary way as provided by section 242 of the Civil Procedure Code, and after hearing the evidence called by the appellant and the execution-creditor, disallowed the claim, and ordered the appellant to pay the costs of the inquiry.

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The Secretary of the District Court taxed the costs of the execution-creditor under class I. in schedule III. of the Civil Procedure Code, on the ground that the value of the land was under Rs. 200.

The Acting District Judge, on being referred to, ordered the taxation to be made under class IV., on the ground that the action in which the decree sought to be enforced was obtained was an action in class IV.

The appellant contends that the Acting District Judge was wrong, and that the Secretary was right. There appears to be no decision of this Court on this point, and, although it is stated that the practice of the Batticaloa Court has always been to tax the costs of these incidental proceedings on the same scale as the costs of the original action, it has been the practice in the Colombo District court, at all events in recent years, to tax them as costs in an independent action.

Section 214 of the Code provides that bills of costs are to be taxed according to the rates specified in sechedule III. of the Code. That schedule divides actions into five classes for the purpose of taxation of costs according as "the cause of action, title to land "or property, value of estate, or subject-matter of the action" is above or below certain specified amounts. In other words, the scale of taxation is to be determined by the amount at stake between the parties. If we apply that rule to this case, what is the amount at stake in this proceeding? It is clearly not the same as the cause of action in the original action.

The claimant is no party to that action. It is true that section 241 provides that the Court is to have power over him "as if he "were a party to the action," in which would be included the power to make him pay costs in a proper case; but it does not say that he is to be treated in all respects as a party to the action. He cannot dispute the validity or amount of the decree. The only question in the claim proceeding is, whether or not the property is liable to be seized in execution.

The object of the execution-creditor is to have the property which is seized declared liable to him to the amount of the decree. Where the amount of the decree exceeds the value of the property, the execution-creditor cannot succeed to a greater extent than the value of the property. Where the value of the property exceeds the amount of the decree, the execution-creditor cannot succeed to a greater extent than the amount of the decree. The measure, then, of the value of the subject-matter of such a proceeding as this will be the value of the property or the amount of the decree, whichever is the less.

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1895.

BROWNE, A.J.

If the rule be as contended by the respondent, it would lead to this anomalous result, that a man whose property is attached by an execution-creditor is to have the valuation of his proceedings to protect his rights determined, not by the value of his property, but by a quite irrelevant consideration, viz., the value of the original cause of action, with which he has nothing whatever to do. So that, if in the execution of a money decree for Rs. 10,000 a house were seized, belonging to the judgment-debtor, in which was a chair or table worth Rs. 10 belonging to a third person, that person, if he wished to assert his right to that property, must run the risk of having the costs taxed against him on the highest scale, if his claim is disallowed.

The order of the Acting District Judge must be reversed, but, having regard to the fact that he followed the established practice of his Court, without costs.

BROWNE, A.J.—

I agree that the order appealed from should be set aside, and the Secretary's taxation of the costs of this claim inquiry be upheld.

It was questioned in argument whether, when section 244 of the Civil Procedure Code mentioned only an order as to payment of Fiscal's fees and charges, the Court had power under sections 244–246 to make order as to payment of costs. I hold that it has the power under section 209, but as that section applies only to costs proper, there was need of this additional power to provide for the payment of these other expenses.

It was also urged for the respondent that the order should be sustained for the reasons given in the decisions reported in *1 C. L. R. 66*, whereby a like order was made as to taxation of costs incurred in claims in concurrence. But (1) these were decisions under the old procedure, when as yet claims were investigated by the Fiscal ere the Civil Procedure Code made them to be determined by the Court, and the Stamp Ordinance No. 3 of 1890 prescribed the Re. 1 stamp on a Fiscal's claim for such purpose; and (2) such claim and investigation is not necessarily "made and entitled as an application in the action," which was the reason for these decisions.

In India such an application when entertained has to be numbered and registered as a suit (*O'Kinealy, section 279*). Our Code has not so directed; indeed, it says the investigation shall be "in a summary manner," and so it might at first be regarded as if it were made in the original action. But when it is remembered how complete in itself the inquiry is when held by

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the Court of the district wherein the property is situated which has not the original record before it, but only the claim with its own nominal stamp, the report and the proceeding thereon, it will be seen, it stands apart altogether from the original action, not only as regards its subject and issues, but as a matter of procedure ; so, too, when the Court of the writ holds such a separate inquiry as in these very proceedings. In either case the only data in the proceedings on which the class can be determined and the bill taxed is the value of the subject of claim. The contingency that the Fiscal would seize property of value exceeding the amount to be recovered under the writ I would regard as generally improbable. Were it to occur, I agree that the class for taxation of claim costs should not, as a rule, be greater than that of the original action.

1895.

BROWNE, A.J.

SILVA *v.* MACK.

1875. *February 9.*

D. C., Colombo, 61,400.

(Roche Victoria's case.)

Fraudulent deed—Want of consideration—Insolvency of grantor—Creditors, antecedent and subsequent to date of deed—English law and Roman-Dutch law—Ordinance No. 7 of 1853, s. 58.

A bond given without consideration by a person in a state of insolvency is void, as a fraud upon all persons who were creditors at its date and prejudiced by it.

A deed cannot be set aside as fraudulent by a creditor who becomes such after the date of the alienation, unless it be proved to have been made with an intention to defeat future creditors.

THE following judgment of the learned District Judge (Mr. Berwick), delivered on June 22, 1874, fully sets out the facts of the case.

" This is an action against the administrator of the estate of the late Roche Victoria by an alleged creditor on a bond by the intestate dated 25th January, 1867, for Rs. 7,150 and interest. The libel sues for this sum and interest from the date of the bond, total Rs. 11,938, and prays that 64 shares of the ship *Geraldina Alexandrina Roche*, specially mortgaged therefor, may be declared executable for the claim. The plea of the administrator is that the bond was voluntary and without consideration, and fraudulently made to defeat creditors. It does not specify any particular

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1875. *February 9.*

creditor as prejudiced or intended to be defrauded. The replication is a traverse and demurrer. A question having arisen whether an administrator could maintain such a plea, setting up as a defence the fraud of the party he himself represents, certain creditors of the deceased were allowed to intervene against the plaintiff, and in their libel of intervention have repeated the plea of the administrator. These creditors are Cargill & Co., Armitage Brothers, and E. Labroy, executrix of the estate of the late Mr. Lorenz.

"As to the want of consideration and indebtedness generally. The bond is dated January, 1867. The consideration set up is an anterior and old loan said to have been made in March, 1861, of £250; another loan in September, 1866, of £220; compound interest on these loans from 1861 till the date of the bond, at 15 per cent., £245, making a total of £715.

"It is admitted that no security of any kind was given for these loans till 1867; that there was no document of any kind to vouch them; no witness of the payments; no evidence whatever of them beyond the unsupported statement of the plaintiff, who is the deceased's son-in-law and a party interested among the heirs in defrauding legitimate creditors; and that no interest was ever paid on the stale alleged debts for which it was said the bond was given. It is proved that the existence of this bond was suppressed from the administrator and from the legitimate creditors for a long period after the deceased's death, under circumstances which naturally gave both special occasion and abundant opportunity for bringing it forward; that the claim was not inserted in a list of Roche Victoria's liabilities prepared by his son, a youth who was acting throughout under the constant advice and assistance of the plaintiff himself; and that the existence of the bond was concealed from the deceased's legal adviser, Mr. Loos, who says 'he (Roche Victoria) never did anything without taking my advice,' and whose client the plaintiff himself in fact was. See the evidence of Messrs. Nicholls, Loos, and Mack.

"Roche Victoria has died insolvent, and we have now to examine how far back in point of date his embarrassments extended.

"There is ample evidence that, as far back as the date of the bond, he was largely indebted, and in difficulties. On the very day before it was signed we find him writing to Mr. Lorenz (G 1): 'No one knows but the Almighty God who created me. I was 'obliged to beg my friends to assist me on this occasion.' Document E shows that in 1863 he owed Nany Tamby £435, and then borrowed a further sum of £1,700, agreeing to repay it in monthly instalments, and it would appear from the deed of assignment of this debt (marked D) that this debt was still subsisting in 1872.

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Mr. Dawson's award (Q) shows that in 1870 he was indebted to Nany Tamby in £1,472, balance due on promissory notes unsettled since 1865. The letters by him to Mr. Lorenz in 1868 are not too far removed in point of date from that of the impeached bond (and these were not objected to on any other ground) to be relevant as to the state of his affairs when it was granted. In the absence of any evidence of sudden and independent pecuniary reverses having occurred in the interval, to which, and not to old indebtedness, the impecuniosity there referred to might reasonably be ascribed, the whole tenor of those of 18th March and 30th September, 1868, (G 4 and 5), admits of no explanation consistent with solvency. In the latter he writes: 'I must confess the truth in this matter that if you are [had] not interfered in this matter in time, I would have [been] smashed, and would have [been] exposed to the public long ago .... Not only I, Sir, but every mother's child will say even now or up to date that the poor Roche is living on Mr. Lorenz's bread,'........ and much more language to the same effect, such as only an insolvent entreating a creditor's indulgence would use. In the same letter he alludes to the imminent seizure in execution of one of his ships on a judgment obtained by the bank. It is true that the reception in evidence of other letters by him to Mr. Lorenz was objected to as inadmissible when tendered on behalf of the intervenients to show Roche's insolvent circumstances at the date of the bond, and that I sustained the objection; but on further reflection I am not quite satisfied that my decision, made on the spur of the trial, and necessarily with little leisure for considering the point, was correct, and I have no hesitation in quoting from the letters marked G, because they were only objected to on the one ground of remoteness of date (which I think is an untenable objection), and not on the ground on which the others were rejected. But there is sufficient evidence even without the documentary proof. Mr. Loos, who was his trusted and confidential legal adviser, consulted by him on and cognizant of all his affairs, swears as follows: 'I was his professional adviser in 1867. From 1867 down 'to the time of his death he was in rather embarrassed circumstances. 'His circumstances were bad in 1866 and for some years before 1867,' and then he goes on to give details.

1875.
February 9.

"The result is such an exceedingly strong *primâ facie* case as to call for rebutting evidence, and failing this I must find as facts that the bond was without consideration, and executed in a state of insolvency. Equally by Dutch and English law these findings make it a fraud upon and void as against all persons who were creditors at its date and prejudiced by it.

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1875.
February 9.

"But of the several intervenients Cargill & Co. were certainly not creditors at the date of the bond, and neither were Armitage Brothers (at least there is no proof that they were); and it is a question whether there is admissible evidence that Mr. Lorenz was. Is such a bond void as against subsequent creditors?

"The English cases turn on the construction of *13 Eliz., cap. 5*, and the most important recent cases to the point are *Jenkyn v. Vaughan, 3 Drew, 419; Spirett v. Willows, 34 L. J., ch. 365;* and *Freeman v. Pope, 39 L. J., ch. 148 and 689.* In the first Vice-Chancellor Kindersley held that a subsequent creditor may file a bill if any debt due at the date of the voluntary settlement remains due at the date of the bill. In *Spirett v. Willows*, a distinction was taken between an impeachent by an antecedent creditor and by a subsequent one, it being there held by Westbury, Lord Chancellor, (1) that when any debt contracted anteriorly to a voluntary settlement is impeded thereby, and still exists unsatisfied, such a creditor may impeach the settlement, however solvent the debtor may have been at its date; but (2) when subsequent creditors impeach it, they must show either insolvency (or deep indebtedness) or express intent to defraud creditors. Lastly, *Freeman v. Pope, 39 L. J., ch. 148 and 689*, seems to have dissolved this distinction, and has decided in effect that when any debt contracted before the settlement still exists unsatisfied, either the antecedent creditor or a subsequent creditor may impeach the settlement, however solvent the debtor may have been at its date, or however remote it may have been from his intention to delay or defraud creditors. Vice-Chancellor James, dealing in that case with the claim of a subsequent creditor, and an antecedent debt still existing, when stating the results of the previous cases, says: 'It is immaterial whether the debtor had any 'intention whatever of defeating his creditors,'....... and again, 'however honest the settlement was, and however solvent the 'settler was, at the time.' These principles are however to a large extent opposed to the Civil law and to other systems of enlightened jurisprudence, as well as to former English cases. See *2 Bell's Com. on Scotch Law, 182–186; 2 Kent's Com. on American Law, part V., 38; Story's Equity Jurisprudence, sections 349, 361, 362, &c.; Chitty's Coll. of Statutes, tit. Fraudulent Conveyances;* and on Civil law see *Voet ad Pand., XLII. 8, 14.* Further, Vice-Chancellor James came very reluctantly to his decision in *Freeman v. Pope;* and *Spirett v. Willows* (on which that case hangs) has been acutely criticised (*May's Voluntary and Fraudulent Alienations, p. 43*), and has been brought forward

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and overruled in America (*ib. 46*); and the effect of it is considerably modified by the grounds given for affirming *Freeman v. Pope* in appeal (*L. R. 5, ch. 538–541*). 1875. *February 9.*

"It is unnecessary in the present case to decide what the right of creditors would be in the case of both innocent intent and perfect solvency at the date of the fraudulent settlement, because here I find as a fact that there was insolvency at that time; but it is not so clear that there was an intention to defraud the present or any then future creditors by it. I am therefore called upon to determine whether, by the law of this country, when there has been insolvency at the date of the settlement (or produced thereby), a creditor to whom the debtor subsequently became indebted, but whom there was no intention to defraud thereby, may impeach it; and whether the existence of some antecedent unsatisfied debt is necessary to enable him to do so.

"The subject is one on which there is much conflict of laws. The law of Scotland differs from that of England, and the laws of the United States of America differ among themselves. Mr. Justice Story, rather however expressing his opinion, as a legal philosopher, of what the law ought to be, says: 'Where the conveyance is 'intentionally made to defraud creditors' (antecedent creditors, I presume he means) 'it seems perfectly reasonable that it should 'be held void as to all subsequent as well as to all prior creditors on 'account of ill faith.' (*Equity Jurisprudence, section 361.*) According to English law, the element of fraudulent intent seems now to be altogether eliminated by *Freeman v. Pope*, and a subsequent debtor, as already stated, may impeach a voluntary settlement if (as settled in *Jenkyn v. Vaughan*) there be still existing at the time of impeachment any debt contracted antecedent to the settlement. I think this condition of an antecedent and still existing debt is sufficiently proved in this case in respect to the sum entered in the list of registered claims as due to Nicholls & Co., who are the last of a series of assignees of a debt contracted by Roche Victoria to Nany Tamby. But, is this also the Roman-Dutch aw? Or, failing facilities for answering the question in this form, is it the Civil law? For I cannot acquiesce in the argument that section 58 of the Insolvency Ordinance, introducing English law in certain cases, applies to the present one. The word 'insolvent' must be there construed to be a person who has been adjudicated insolvent under the Ordinance.

"It appears to me that the Civil law requires a concurrence of prejudice and fraudulent intention immediately directed against the person who seeks to impeach the deed; that is to say, there must be both those circumstances, and they must also meet in the

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1875. *February 9.*

same person; Voet indeed says: *Competit haec actio creditoribus in quorum prejudicium res fraudulenter alienatae sunt* (*Ad Pand, XLII. 8, 3*). The passage, however, which he cites from the *Digest* in support of this statement (*XLII. 8, 1 pr.*) uses the expression 'fraud,' and not 'prejudice,' and is immediately followed there by the explanation *quo edicto consuluit creditoribus revocanda ea quæcunque in fraudem eorum alienata sunt* (*Digest, XLII. 8, 1, s. 1*). In *XLII. 8, 10, s. 1*, we find a distinction taken where the claim of the antecedent creditor has been settled, but other creditors remain. *Ita demum revocatur, quod fraudandorum creditorum causa factum est, si eventum fraus habuit scilicet si hi creditores, quorum fraudandorum causa fecit, bona ipsius vendiderunt. Ceterum si illos dimisit quorum fraudandorum causa fecit et alios sortitus est, si quidem simpliciter dimissis prioribus, quos fraudare voluit, alios postea sortitus est, cessat revocatio; si autem horum pecunia, quos fraudare noluit, priores dimisit, quos fraudare voluit, Marcellus dicit, revocationi locum fore. Secundum hanc distinctionem, et ab Imperatore Severo et Antonino rescriptum est, eoque jure utimur*; that is to say, 'subsequent creditors who are not intended to be defrauded by the 'fraudulent act cannot impeach it, unless the creditor who was 'intended to be defrauded has been paid off with their money.' (This is analogous to the Scotch law, *2 Bell's Com. 184; Erskine's Inst. 4, 1, 29, 30*, and manifestly falls far short of the English law as settled in *Jenkyn's v. Vaughan.*)

"Accordingly Voet, when he is enumerating the various features which the actions *Pauleana* and *Recissoria* have in common (there being much resemblance between them, but the latter restricted to alienations after the judicial execution against an insolvent's estate called the *missio* in *possessionem*), says at paragraph 14, that one of the features they have in common is fraud on the part of the debtor, but that in this fraud two things must concur, to wit, the intention or design of defrauding, knowing that he was insolvent, and that he was nevertheless diminishing his estate, and a result corresponding to that intention, whereby his creditors are unable to recover their rights; and he adds: 'and finally [it is necessary] that the 'fraudulent intention and the result concur in the person of the same 'creditor, unless he whom the debtor originally intended to defraud 'has been settled with out of the money of the creditor defrauded 'in fact.' He closes the paragraph by deducing the consequence that no action is competent unless the debtor was insolvent at the time of the fraudulent gift or sale, or unless the alienation itself would have the effect of making him so.

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"A case very much in point is thus put in the *Digest* (*XLII. 8, 15*) :—'If one who is a debtor to Titius, and is aware of his own 'insolvency, gives his slaves their freedom by his testament, and 'then, after having paid off Titius, becomes indebted to Sempronius 'and dies, leaving his testament unrevoked, the manumission of his 'slaves remains valid, although his estate be insolvent.' So far this shows that a voluntary settlement made by a person who is at its date in a state of insolvency is good against subsequent creditors, if no antecedent creditor's debt remains unsatisfied (compare *Freeman v. Pope*), but what if the debt remained due to Titius at the time that the debt to Sempronius was incurred, or if both remained due at his death ? That Titius could set aside the voluntary settlement there is no doubt (*Instit. lib. 1, tit. 6, section 3*), but could Sempronius, who was not a creditor at its date, do so as in the English law ? The reasoning given in the *Digest* (*XLII. 8, 15*) for the decision there mentioned equally applies to and answers this question; and in the negative *quia libertates ut rescindantur, utrumque in eorundem persona exigimus et consilium et eventum : et si quidem creditor cujus fraudandi consilium initum erat, non fraudatur ; et adversus eum, qui fraudatur consilium initum non est ; libertates itaque ratae sunt*, *i.e.*, 'because in order that the manumission should 'be set aside we require both [fraudulent] intention and a result 'corresponding therewith ; and inasmuch as the creditor, who was 'the object of the fraudulent intention, is not defrauded, as regards 'him who is defrauded, the fraudulent design is wanting.' In the case I have put it is true that Titius is defrauded, but in respect to the plaintiff Sempronius, who alone impeaches the deed, a fraudulent design is wanting. This passage, together with the text which follows it in the *Digest*, is one of the authorities which *Voet* cites for his definite proposition that the fraudulent design and the issue thereof must concur in the same creditor, except when the antecedent creditor has been paid with the money of the subsequent one.

"I shall certainly desire to give what the Germans call an expansive interpretation to the law against frauds on creditors, as has indubitably been largely done both in England on the Statutes of Elizabeth, and in Scotland on the corresponding Statute 1621, s. 18. But to do that is one thing, and to decide in express contradiction to law is another ; and I feel constrained to hold on the authority of *Voet* (*XLII. 8, 14*), that in order to a voluntary settlement or fictitious objection (which is the matter here) being impeached, it must be shown that there was an intention to defraud the very creditor who has been actually prejudiced by

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1875. February 9. it; and I can find no authority for holding that any creditor who is not in that category can come into Court to impeach it.

"This opinion, however, does not necessarily infer that in no case is a person who only became a creditor after its date outside of that category. For the fraudulent intention may have been to defeat future as well as antecedent creditors.

"Whatever contrarities exist among different systems of jurisprudence as to the rights of subsequent creditors when there was no actual intention to defraud any one, or an intention to defraud any one, or an intention to defraud antecedent creditors only, I think there is no room to doubt that, where there has been an actual intention to defraud future creditors as well, any one of them who is prejudiced may set aside the deed.

"I have therefore further to find whether this intention existed in this case. I believe that it did. It almost happens in this country that gratuitous alienations and mortgages for sham debts are made by persons in insolvent circumstances, for the purpose of the alienee or mortgagee being a secret trustee to preserve property for the debtor's fraudulent benefit after he has gone through the insolvency court, and to put his estate out of the power of subsequent as well as prior creditors, while he goes on trading recklessly and on a false display of capital. I am bound in fairness to the deceased to say that there is no evidence before me that he traded recklessly after creating this fictitious debt, which indeed was registered in usual course. But at the same time we know that the mortgage of the vessel would have been futile without registration, and we know how notorious it is to every one that, except where special inquiries become necessary in transactions regarding the very land or subjects mortgaged, how little wiser the public are as to encumbrances or alienations of property which remains in the possession, and apparently the property, of the ostensible owner. I place little account therefore on the mere fact of registration in dealing with a question of indent to put property beyond the reach of future creditors, and I think it is a legitimate presumption that, where an insolvent carries on trade and incurs considerable debts after creating a sham debt by way of a secret trust, which would have the effect of prejudicing future as well as prior creditors, his intention was in accordance with the result. In this I only apply the legal maxim that a man must be presumed to have intended the natural consequence of his own acts, a maxim which is ten-fold stronger where that act is fraudulent. At the same time I must add that an intention to defraud future creditors by this mortgage has not appeared to me free of fair ground for doubt, and it is therefore

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that I have felt it necessary to consider the law which must be applied in case of its absence. If this case should be appealed, and this intention be ultimately negatived in appeal, then, on the view I have arrived at on the law, I think the plaintiff will be entitled to judgment against both the defendant and the intervenients. 1875. *February 9.*

"On my finding, however, and on the foregoing view of the law, it is necessary to decide whether Roche Victoria was indebted to Mr. Lorenz (represented by the intervenient La Brooy) at the time the deed was executed or not. It is sufficient to set aside the deed that I have found as a fact that it was to the best of my judgment intended to defraud some future creditor, and two of the intervenients are in that category. I need scarcely observe that a fictitious debt, putting oneself under an obligation for what he did not owe (which is the case here), stands in all respects on the same footing as a voluntary settlement. The *Digest* has *Sive se obligavit fraudandorum creditorum causa* (*XLII. 8, 3*). The bond and mortgage will be declared fraudulent as against the intervenients. I cannot dismiss the plaintiff's claim against the defendant, because he represents not creditors but heirs, and as against them the plaintiff's claim is good, and must be upheld; for the transaction is good as between the parties to it and their heirs, though bad as against all creditors. The defendant as administrator will therefore pay the plaintiff's cost, but the plaintiff will pay the intervenients' costs.

"As the law applicable to a case of this kind has been very fully discussed in this suit, and that adopted (mainly on the authority of the Civil law as interpreted by *Voet* in *XLII. 8, 14* of his *Commentaries on the Pandects*) is in conflict with English law, though I feel fully fortified by the examplars of the Scotch law and the law of Louisiana, the jurisprudence of which kingdom and state are both founded, like our own, on the basis of the Civil law, it will be useful to put in a concise proposition what I have now held to be the law of Ceylon. In a note to *Kent's Commentaries, vol. 2, p. 442*, will be found the following passages :—'In Louisiana a deed cannot be set 'aside as fraudulent by a creditor who becomes such after the date 'of the alienation, unless it be proved to have been made with an 'intention to defeat future creditors.' This I consider exactly to express the law of this country, if we add the words 'or unless it 'be proved that a person who was a creditor at its date has been 'paid with the money of the subsequent creditor who seeks to set it 'aside.' And with this addition it exactly and tersely summarizes what I have decided on the points raised in this suit."

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1875. February 9.

The mortgage bond in favour of the plaintiff having been set aside as fraudulent, he appealed.

Fitzroy Kelly (with him *Samuel Grenier*) appeared for him.

Ferdinands (with him *Layard*) for defendant respondent.

Cur. adv. vult.

The case was argued in appeal on 2nd February, 1875.

9th February, 1875. The judgment of the Supreme Court was delivered by Sir RICHARD MORGAN, Acting Chief Justice, as follows :—

The Supreme Court concurs with the learned District Judge in holding that the bond upon which the plaintiff sues was given by the deceased without consideration, and with intent to defraud his creditors.

Affirmed.

1895. August 2.

MANA PERERA, Petitioner, and PERERA APPUHAMY *et al.*, Respondents.

In the Matter of ABRAHAM and ELIAS DE MEL, Minors.

D. C., Kalutara, 51.

Civil Procedure Code, chapter XL.—Application for guardianship—Sale of minor's property by guardian—Powers of guardians.

The Civil Procedure Code does not limit the powers conferred on guardians by the Roman-Dutch law.

A guardian may sell immovable property with the sanction of the Court.

Such sale should be by public auction with a reserve price put upon the property by Court, which should also give directions as to the manner of sale and of the investment of the proceeds thereof.

A mother, married in community and surviving her husband, has a preferential right to be appointed as a guardian of her children, but some other person should be named by the Court to act with her, so as to safeguard the interests of the children.

THE facts of the case appear in the judgment of the Chief Justice.

Dornhorst, for appellant, cited *D. C., Colombo, 392* (*Vanderstraaten's Reports, p. 102*), in the course of the argument.

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2nd August, 1895. BONSER, C.J.— 1895.

BONSER, C.J.

This is an appeal from an order of Mr. de Livera, District Judge of Kalutara, refusing to appoint the petitioner curatrix over the property of her infant children. It appears that the petitioner and her late husband were married in community of property, and, therefore, the children and the appellant are jointly entitled to the estate. The estate, which is of very small value, consists in part of an undivided four-fifths share in some land situated at considerable distance from the home of the widow and the children, and it is therefore well-nigh impossible for the widow to look after the interest of herself and the children in the land. In these circumstances, she was of opinion that it would be better for all parties if the share were sold. Hence she applied to be appointed curatrix in order that she might sell the shares to certain persons whom she named, and whom she proposed that the sale should be effected by private contract. The District Judge refused the application on the ground that there is no provision in the Civil Procedure Code empowering a curator *ad litem* to sell property belonging to minors. But it is to be observed that the appellant did not apply to be appointed curator *ad litem*. She applied under chapter XL. of the Civil Procedure Code to be appointed guardian. Now, I do not understand that the Code anywhere limits, or is intended to limit, the powers of guardians.

It provides for their appointment and for the way in which they may be called upon to render accounts, and so on; therefore, when we wish to see what powers guardians have, we must have recourse to the law existing before the Code. I find it laid down in *Thompson's Institutes, vol. II., p. 60*, that a guardian may sell immovable property, but not without the leave of the Court. It is also stated by him (*p. 53*) that the surviving mother is to be preferred to anybody else as a guardian, but that she ought to have a colleague appointed with her. The reason for appointing a colleague is, I imagine, because it is the duty of the guardian to make an inventory of the children's property, or to demand it from the surviving parent. Therefore, in the present case, I think the mother should be appointed guardian together with some other person whom the District Judge may approve of; and that at the same time the District Judge should, if he is satisfied that the sale of the property will be of benefit to the children, make an order that the property be sold, and give directions as to the manner of sale and the investments of the proceeds, either by depositing in the Loan Board, or, if he thinks it will be more beneficial to the minors, allowing it to remain with the guardian on her giving

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1895.

Withers, J.

good security in the shape of immovable property for its repayment. The sale should not be a sale by private contract, but should be a sale by public auction, and the Court should fix a reserve price so as to prevent the property from being sold for less than its value.

Withers, J.—

I fully concur in the order of the Chief Justice, and have only to add that, by section 64 of the Courts Ordinance, District Courts have jurisdiction over estates of minors. That being so, it is surely a proper exercise of jurisdiction to sanction the disposition of a minor's property when it is clearly to his benefit. See, for instance, the case reported in *Vanderstraaten, 1870, p. 102 (D. C., Colombo, 392)*, where the uncle of four minors was appointed guardian over them for the purpose of alienating their share in an estate which they owned with others, a purchaser having come forward who was prepared to give a fair price for the property.

1894.
October 4, 11.

LOWE v. POLORIS.

D. C., Chilaw, 608.

Promissory note—Illegal consideration—Charge of criminal misappropriation against defendant—Promise not to press such charge, part considearion for note.

P, who had been charged before a Police Court with criminal misappropriation of goods entrusted to him by L, granted to L, during the pending of such case, a promissory note for part of the value of such goods and paid him the balance in cash, obtaining at the same time an acknowledgment from L that he had received in full the amount due to him "from P, the defendant in P. C. case No. 3,664."

Held that, as the debt due was not the only consideration for the note, but the agreement also not to prosecute any further the criminal charge then pending, the note was tainted with a bad considera'ion, and was void.

ACTION on a promissory note. Defendant, *inter alia*, pleaded that he received no consideration, and that "plaintiff "obtained the said document by fraud, coercion, and duress."

The District Judge gave judgment for plaintiff, seeing no reason to doubt his statement that the promissory note was granted in consequence of defendant not accounting to the plaintiff for a

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quantity of copperah entrusted by him to the defendant for delivery at Colombo; that the defendant paid plaintiff a part of the value of the copperah in cash, and for the balance granted the promissory note; and that thereupon plaintiff withdrew a criminal charge of misappropriation which he had brought against the defendant, and which was then pending in court.

Defendant appealed.

4th October, 1894.—*Seneviratne* appeared for appellant, and *Aserappa* for plaintiff respondent.

Cur. adv. vult.

11th October. Lawrie, A.C.J.—

The answer is evasive and disingenuous; I do not rely on the evidence of the defendant. I examine only the evidence of and the receipt given by the plaintiff, and in these I find sufficient admissions and proof that the consideration for this note was at least in part illegal. It involved the dropping of a criminal prosecution, for which the Police Magistrate of the district had issued a warrant for the apprehension of the first defendant. I think there can be no doubt that the defendant Poloris and the first accused Podi Sinno are one and the same person.

The plaintiff says that the first defendant was arrested after he gave the promissory note. This I think may safely be said to be untrue. He was certainly under arrest when the note was made. It is said by the plaintiff that the consideration for the note was the value of copperah which he had charged the first defendant and others with having misappropriated. The discharge granted by the plaintiff at the same time as the note was made, refers specially to the criminal case 3,664; it is an amicable discharge of the amount referred to in that case, and this writing under the hand of the plaintiff seems to me to prove clearly that part of the consideration for the note was the giving of a document, which the parties believed would convince the Magistrate that the plaintiff had settled, and had no further claim against the defendant.

There may have been a debt due by the first defendant to plaintiff. I assume that there was, but that was not the only consideration for the making of the note, that certainly was not the consideration moving the second defendant (the first defendant's wife) to make it.

The consideration was that the plaintiff would not insist in and continue a prosecution for criminal misappropriation which he had already instituted; and as I am of opinion that this note is tainted with a bad consideration, I would set aside and dismiss the action with costs.

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1894. WITHERS, J.—

WITHERS, J. This is an action on a promissory note for Rs. 120 with interest. alleged to have been made by the defendants to plaintiff at Marawila on the 28th day of August, 1892.

The answer did not deny the making of the note, but raised every possible objection against the makers being adjudged to pay the amount. The principal pleas raised are illegality of consideration and duress.

These defences are imperfectly pleaded, and the answer containing them should have been returned for amendment, or, if the party would not amend these pleas, should have been struck out.

The 75th section of the Code requires that the circumstances of the case upon which the defendant means to rely for his defence should be stated. The answer should have disclosed the circumstances which constituted "duress," or made the consideration "illegal."

The plaintiff, however, made no objection to the form of the answer. He no doubt understood the drift of it, and he let the case go to trial without any settlement of issues.

In the argument in appeal, the two defences of duress and illegal consideration were so mixed up together that I was not quite able to apprehend the line of defence.

I was not satisfied that the plea of duress had been made out, and so I address myself to the plea of illegal consideration. It is admitted that the plaintiff charged the defendant before the Police Magistrate with a criminal offence relating to a quantity of copperah which he alleges he entrusted the first defendant with to take to Colombo for sale. Upon that charge a warrant of arrest was issued by the Police Magistrate, and this accused was arrested by one Sebastian, Police Headman of Marawila.

It is admitted that this note was demanded by the plaintiff of the defendant on account of the copperah which was the subject of the criminal complaint. Whether this note was made before or after the arrest by the police headman is not clear from the evidence. Plaintiff says it was before, defendant says it was after, the arrest.

On the same day, however, as the note was given by the defendant to the plaintiff, a receipt was granted by the plaintiff to the defendant, the correct translation of which is said to be as follows :—
"Received amicably on the 28th August the amount in full due to
"me from Kuruppu Arachchige Peloris Appu, of Wennappuwa,
"the defendant in case No. 3,664, and his wife Catherina Hamy.
"Signed Paulu" (*i.e.*, plaintiff).

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Plaintiff, who gave this receipt, speaks of it in these words : "I "gave a receipt to the defendant. It was a discharge, on condi- "tion that I would not proceed further with the case against "him." The case referred to is No. 3,664, and is the criminal matter above mentioned.

1894.

WITHERS, J.

After careful consideration of the evidence I find it impossible not to regard the demand for the note, the making it, and the granting of the receipt, as one transaction, and impossible not to say that a part of the consideration for the making of the note was the promise not to prosecute the first defendant any further in the criminal case No. 3,664.

That being so, the agreement not to prosecute clearly vitiates the whole transaction, and renders the promissory note void.

The judgment should be set aside, and plaintiff's action dismissed with costs.

Action dismissed.

SILVA *v.* BABAHAMY.

1895.
August 2.

D. C., Galle, 2,980.

Civil Procedure Code, s. 74—Answer—Time for filing.

Section 74 of the Civil Procedure Code does not contemplate only one extension of time for filing answer, the words "at any subsequent time" of that section being intended to meet a case of more than one extension.

THE facts of the case are fully stated in the judgment of the Chief Justice.

Alwis, for appellant.

2nd August, 1895. BONSER, C.J.—

In this case the appellant was not ready with her answer on the day fixed for her answer, and she got leave to file answer on a subsequent day. On that day, however, she was not ready; but the Court did not proceed to hear the case *ex parte* and make a *decree nisi* as it might have done, but fixed the trial of the action for a date two months later. Long before the date of trial the defendant appeared and applied for leave to file answer, and stated in an affidavit the reasons—on the face of them satisfactory—why she had not filed her answer on the day fixed for that purpose by the Court. The District Judge, however, held that he had no power to receive the answer or to extend the time for filing answer, being of opinion that section 74 of the Civil

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1895.

Bonser, C.J.

Procedure Code allowed only of one extension of time for filing answer.

I am of opinion that the District Judge has construted the Code too literally, and that it admits of a more elastic interpretation. I think the words "at any subsequent time" are intended to meet a case of more than one extension, and, therefore, that the appellant ought to be allowed to file her answer.

The District Judge suggests that she should wait until the case has been heard and decided, and then, when she has been served with notice of the decree, move to have it set aside. That would be a most inconvenient procedure. I think every reason of justice and convenience favours her being allowed to file answer.

The appeal is allowed.

Withers, J., concurred.

1895.
July 30. August 2 and 9.

CAVE *v.* KRELTSZHEIM.

P. C., Colombo, 38,081.

Evidence—Forgery—Comparison of handwriting in disputed document with handwriting in genuine document.

In a case of forgery, a Judge sitting without a jury should not arrive at a decision on the comparison of handwritings without some proof that the handwriting of the disputed document is the handwriting of the accused.

Bonser, C.J.—I am not satisfied that it was intended to allow a jury to find a man guilty of forgery, when no qualified witness could be found willing to state his belief that the alleged forgery was in the handwriting of the accused.

Withers, J. (with much hestitation).—It is permissible for a jury or Judge to bring in a verdict of guilty on the comparison of a disputed handwriting with a well-proved handwriting, unsupported by other evidence as to the disputed handwriting.

But a decision of Judge or jury resting solely on a comparison of other than ancient documents is dangerous.

THE complaint against the accused was that he committed criminal breach of trust of certain goods entrusted to him as Value-Payable Parcel Register Clerk of Messrs. Cave & Co. of Colombo. At the inquiry it appeared that some of the goods mentioned were parted with by Cave & Co. on the strength of two letters (marked C and D), which purported to come from one Fernando from Kandy. The first letter ordered the goods, and

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the second called attention to it, and it was proved that Fernando was a fictitious person. Certain books (marked B and G) kept by the accused and in his handwriting were also produced and referred to by a witness for the prosecution. The Police Magistrate thereupon framed three charges against the accused :— 1895.

(1) Under section 457 of the Penal Code, that he committed forgery of the letters C and D.

(2) Under section 403 of the Penal Code, that he cheated Cave & Co. and dishonestly induced them to deliver to him certain goods.

(3) Under section 391 of the Penal Code, that he committed criminal breach of trust of the property.

The accused consented to be tried by the Police Magistrate, and after he had adduced evidence for the defence, the Police Magistrate found him guilty of having forged the two letters C and D, for the purpose of cheating and dishonestly inducing delivery of property in question, and sentenced him to nine months' rigorous imprisonment, observing : " The articles mentioned in the charge "under section 403 of the Penal Code were ordered by letter C; "and this order was repeated by letter D. These two letters, "I have not the slightest doubt, were written by one and the same "person, and that person was the accused, the person who made "the entries in the books B and G, which have been proved to "have been made by the accused. There is a striking general "similarity between the writing and each letter to the writing "of the other, and between the writing of both letters to the "writing of the entries in the books B and G; and a close "examination with a glass discloses a similarity and an identity "in detail which is more than a coincidence," &c.

The accused appealed.

The appeal was argued first on the 30th July, 1895, when *Pereira* appeared for appellant and *Van Langenberg* for respondent. And the case having stood over for *Pereira* to furnish authorities, it was argued again on the 2nd August, 1895, when *Pereira* appeared for appellant and *Dornhorst* for respondent.

Pereira, for appellant,—

The accused was originally charged with theft of certain articles. But the Police Magistrate charged him with forgery of the documents C and D and with cheating, and convicted him on those charges. There was no evidence before him to justify these charges. He based his finding on the charge of forgery entirely on a comparison of the documents C and D with certain other

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1895. documents produced by the complainant, not to prove handwriting, but to prove the fact of certain entries made by the accused. A Judge or jury may compare handwriting to test the correctness of opinions expressed by witnesses with regard to an impeached document, but where no witness has given any evidence as to impeached documents being forgeries, and where it is not a part of the case for the prosecution that the accused forged such documents, it is not open to Judge or jury to discover, so to say, after the close of the whole case, evidence by comparison of documents not produced expressly for purpose of comparison. The effect of the judgment of Blackburn, J., in *Regina v. Harvey*, is stated, in *Archibold's Pleading and Evidence in Criminal Cases, 21st ed., p. 312*, to be that under *section 8 of 28 Victoria, c. 18*, the disputed handwriting and the writing whose genuineness is proved cannot be submitted to a jury in order that they may draw their unaided conclusion from a comparison, but that they must be assisted by the evidence of an expert. Besides, the accused in this case was taken by surprise. He had no reason to anticipate that the absence of evidence would be supplied by a comparison of handwriting by the Magistrate himself, and he had no opportunity of stating to the Court his reasons against the conclusions drawn by the Magistrate by comparison of handwriting.

Dornhorst, for the respondent,—

Comparison of handwriting may be made without the intervention of any witnesses at all, by the jury themselves, or in the event of there being no jury by the Court (*Taylor, 8th ed., vol. II., p. 1585*). According to the old law, only Judge or jury can compare handwriting. The statute left the old law where it was. [BONSER, C.J.—There must be positive evidence that the disputed writing is the writing of the accused.] According to *Solita v. Yarrow* (*1 Moody and Robinson, 133*) a jury may judge of a disputed handwriting by comparing it with other documents put in evidence for other purposes, and admitted to be of the handwriting of the party. [BONSER, C.J.—But Mr. Pereira says that there is no evidence whatever that the documents were in accused's handwriting.] But it is open to the Court, nevertheless, to compare. Again, according to *Griffith v. Williams* (*1 Crompton and Jervis, p. 47*), the rule that comparison of handwriting is not evidence does not extend so far as to prevent Judge or jury from instituting a comparison between two documents of which *primâ facie* evidence has been given.

Pereira in reply. *Cur. adv. vult.*

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9th August, 1895. WITHERS, J.—

In this case the appellant has been convicted by Mr. Moor, the Police Magistrate of Colombo, of the offence of forging two letters, and of the offence of cheating by means of those letters.

The main question which we have to decide is whether the evidence sustains the conviction of forgery.

In the information which founded these criminal proceedings the accused was charged with criminally misappropriating certain articles entrusted to him by Mr. S. Cave.

At the close of the case for the prosecution, the Magistrate, considering that a *primâ facie* case had been made out against the appellant of the offence of forgery and cheating, charged him accordingly, and called on him to answer these charges.

In the course of the inquiry into the original charge of criminal misappropriation two books were produced, which were proved to the satisfaction of the Magistrate to contain entries in the handwriting of the accused. The Magistrate founded his judgment on a comparison of the imputed with the genuine handwriting. He had no doubt that the man who wrote the one wrote the other, and, so believing, he convicted the accused of forging the letters C and D.

It was urged by appellant's counsel that a Judge or jury could not bring in a verdict of guilty upon the mere comparison of a genuine with a controverted writing; that before any such comparison could be made some foundation of proof must be laid as to the disputed writing being in the hand of the party accused.

In this case, no one acquainted with the accused's handwriting was called to swear to his belief that the letters C and D were in the accused's handwriting. Nor was any expert or skilled witness called to compare the genuine with the imputed handwriting, and state upon oath that he believed that both writings were in the hand of one and the same person. In support of his contention, appellant's counsel cited the case of *Regina v. William* and *Henry Harvey* reported in *Cox, C. L. Cases, vol. XI., p. 546.* These prisoners were indicted for forging and uttering a cheque, and the case against Henry Harvey rested on the evidence of some copy books found by a policeman at that prisoner's house, the handwriting of which, it was contended, corresponded with the writing on the cheque. The prisoner's counsel objected to the evidence, on the ground that police officers and constables were not competent to give evidence as experts.

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1895.

WITHERS, J.

Blackburn, J., who presided at the trial, is reported to have observed as follows :—

The jury can inspect them and compare them with the forged document. But still they are only copy books, which go no further than to show that the prisoner was taught writing. I think the evidence is very weak, and I do not think the jury ought to act upon it without the assistance of an expert. The policeman is certainly not a skilled witness, and, according to *Regina v. William*, not a competent one. Mr. Cherry drew attention to *28 Victoria, c. 18, section 8*, which enacts that " comparison of a disputed writing with any writing proved to the " satisfaction of the Judge to be genuine, shall be permitted to be made " by witnesses, and such writing and the evidence of witnesses respect- " ing the same may be submitted to the Court and jury as evidence " of the genuineness or otherwise of the writing in dispute." But here we have no expert, and I do not think it would be right to let the jury compare the handwriting without some such assistance. The evidence is very slight.

The learned Judge seems to have regarded the copy books as very slender evidence of the prisoner's handwriting, and he was not minded to submit them to the jury for comparison without the aid of an expert in handwriting.

I gather from the report that he would have let them go to the jury for comparison if he had been satisfied that the books were in the prisoner's handwriting. If I am right, this case is rather against Mr. Pereira. The Act of *28 Victoria, c. 18, section 8*, was passed to bring the criminal law on the subject in conformity with the practice in civil cases under the *Common Law Procedure Act, 1854, section, 27*, which is identical with the former.

Taylor's comment on these Acts in the 8th edition of his work is that the comparison of a writing, proved to the satisfaction of a Judge to be genuine, may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering, or without the intervention of any witnesses at all by the jury themselves, or in the event of there being no jury, by the Court. He cites in support of his opinion the case of *Cobbett v. Kilminster* (*4, Foster and Finlayson, per Martin B*), which is thus referred to in *Fisher's Common Law Digest, vol. 3, p. 1440* :—

The question being whether a memorandum was in the handwriting of the defendant, and he, in the course of cross-examination, having been got to write something on a piece of paper, this was allowed to be shown to the jury for the purpose of comparison of handwriting.

The law laid down in *Allport v. Meek* (*4, Carrington and Payne, p. 267*) is, he considers, no longer law. This was an action of assumpsit on a bill accepted by the defendant drawn and endorsed by one Williams. The witnesses called to prove the handwriting of Williams said that neither the drawing nor the indorsement

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was written by him. It was then proved that the defendant had acknowledged the acceptance to be his, and this being in mercantile law a conclusive admission as against the acceptor of the drawer's signature, it was contended that the jury might look at the indorsement and compare it with the drawing. Tindal, C.J., would not allow this to be done, observing, "I think you must "call some witness to lay some evidence before the jury on which "they may decide." This decision was in the year 1830. It is to be observed that in this case the admission on the one side was met by counter-evidence on the part of the plaintiff, so that there was really no standard of comparsion. *1 Moody and Robinson, p. 133* (*Solita v. Yarrow*), referred to in the course of argument, is thus summed up in the head note: "A jury may judge of a "disputed handwriting by comparing it with other documents in "evidence for other purposes and admitted to be the handwriting "of the party." In that case evidence had been received for and against the genuineness of the writing used as a standard of comparison. In *Griffith v. Williams* (*1, Crompton and Jervis, p. 47*), also referred to in argument, it was decided *per curiam* that where two documents are in evidence it is competent for the Judge or jury to compare them. This was an action for breach of promise to marry, and the plaintiff having put in several letters of the defendant which were admitted, endeavoured to prove another letter of an important character as written by him. This was met by counter-evidence on the part of the defendant.

The old English law no doubt allowed ancient deeds to be put in for the purpose of comparing the seals with those of a disputed deed, and these might be compared by Judge and jury. That was permitted, as the Judges in *Doe dem. Mudd v. Suckermore* (*5, Adolphus and Ellis, p. 703*) observe, on the ground of necessity. The later English law referred to allows comparison by jury or witnesses of any other documents except those already in the case.

As to comparison by a jury of handwriting produced in the cause for other purposes than the question of authenticity of a disputed document, Lord Denman observed in *Doe dem. Perry v. Newton* (*5, Adolphus and Ellis, p. 516*) that the comparison was unavoidable, "there being two documents in question in "the cause, one of which is known to be in the handwriting "of the party, the other alleged, but denied to be so, no "human power can prevent the jury from comparing them with "a view to the question of genuineness, and therefore it is best "for the Court to enter with the jury into that inquiry and

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1895.

WITHERS, J.

"to do the best it can under circumstances which cannot be helped." He added, "The best rule is, that comparison of writings by the jury "shall not be allowed in any case where it can be avoided. When "we consider that the same course which is permitted in a case like "this may also be resorted to in a criminal case for the purpose of a "conviction, we cannot draw the limit too carefully." In this case the will of Mr. John Brockbank was disputed, and in the course of the trial the plaintiff's counsel, in cross-examining one of the defendant's witnesses, put into his hand some letters, which the witness said he believed from the character to be of Brockbank's handwriting. It was afterwards proposed on behalf of the plaintiff to submit these letters to the jury, in order that they might compare them with the disputed signature, and thereby judge both of its genuineness and of the credit due to the witnesses on this subject. The letters were not in evidence for any other purpose. The Judge would not allow them to be put in, and his order was sustained by the Court of King's Bench. This was in 1836. It is clear that the statute of 28 Victoria has altered that law.

Giving my best consideration to the arguments adduced to us and to the cases before referred to, I come with no little hesitation to the conclusion that jury or Judge may bring in a verdict of guilty on the comparison of a disputed with a well-proved handwriting, unsupported by other evidence as to the disputed handwriting. I think, however, that a decision resting solely on comparison by Judge or jury of other than ancient documents is of a very dangerous character, and speaking for myself I should not venture, as a Judge sitting without a jury, to arrive at a decision solely on the comparison of two or more documents. I think some foundation of proof as to the handwriting of the disputed document should first be laid before a Judge should act upon his own comparison.

Another point of importance was pressed upon us by Mr. Pereira. He urged that his client had not sufficient opportunity given to him to meet the altered charge of forgery. The judgment by comparison of the incriminated letters with certain entries in books alleged to have been made by him, it was urged, took the prisoner by surprise. Not anticipating that the Magistrate would found his judgment pronouncing him guilty of forgery on such comparison, he did not show cause against the value of that evidence on which he was convicted. He may, for all I know, have contested the writing in the books alleged to be in his handwriting.

I think he should have a further opportunity of meeting the

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charge of forgery, and indeed I think evidence should at least be called for as to the handwriting of the imputed papers before he is required to meet the charge, and I would accordingly quash the conviction and remit the case for further trial on the charges of forgery and cheating.

Bonser, C.J.—

I agree that there should be a new trial in this case. At the same time I doubt whether the statute *28 Victoria, c. 18, section 8*, has the effect that Mr. Taylor in his work on *Evidence* ascribes to it. The question is not one of much practical importance, for I do not think that the case of a man being convicted of forgery solely on the evidence afforded by a comparison of written documents, without any testimony either of experts or of persons acquainted with his handwriting, has ever before occurred or is likely to occur again. The statute appears to me to have been passed to facilitate proof of handwriting in two ways—first, by allowing written documents to be put in evidence merely for the purpose of comparison with the disputed document, although they were not evidence for any other purpose ; and secondly, by admitting the evidence of persons who were not acquainted with the handwriting of the person charged, but who, as experts, could give their opinion based on a comparison of an admitted writing with disputed writings.

I am not satisfied that it was intended to allow a jury to find a man guilty of forgery, when no qualified witness could be found willing to pledge his oath to his belief that the alleged forgery was in the handwriting of the accused.

I would add that this case, involving as it does questions as to the course of business in a shop, seems to me to be one which should be tried with the assistance of some persons who are acquainted with the way in which business is carried on in this town, and it should therefore be tried either in this Court or by the District Judge of Colombo with assessors.

Remitted for new trial.

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1895.
July 24.

THWAITES *et al.* *v.* JACKSON.

C. R., Nuwara Eliya, 882.

Brute animal—Injury by hunting dogs—Liability of owner for damages—Direct and consequential damages.

The owner of a pack of hunting dogs, which killed a calf while standing loose on a high road, is liable in damages to the owner of the calf.

The damages may include not only the value of the calf, but also the loss of milk consequent upon the death of the calf.

Folkard v. Anderson (*Rámanáthan's Reports, 1862, p. 68*) commented upon.

Per BONSER, C.J.—There seems to be no justification for the proposition stated in *Folkard v. Anderson* that the amount of compensation should not exceed the value of the animal which caused the injury.

THE plaintiffs raised this action for the recovery of damages arising from the loss of a calf killed by some hounds belonging to the defendant. Plaintiffs claimed Rs. 20 as the value of the calf, and Rs. 80 for loss of milk and butter consequent upon the death of the calf.

The defendant pleaded that the plaintiffs were not entitled to maintain this action, and answering to the merits, averred that while he was exercising with all proper care and precaution the right of hunting with his hounds, the calf in question strayed on the road, crossing the trail or scent of the defendant's hounds, and was seized and killed by them, notwithstanding all his efforts to prevent it: that the plaintiffs by their negligence contributed towards the accident; and that he tendered Rs. 20 to the plaintiffs as the value of the calf, which they refused to accept. He denied that plaintiffs had suffered any other damage.

The Commissioner held that plaintiffs' action was maintainable in law, but dismissed it, being of opinion that " the first plaintiff " was in the wrong in allowing his calf to stray on to and along " a public highway untended, and the defendant was in his right " when he passed along the highway with his hounds coupled."

The plaintiffs appealed.

Dornhorst (*Jayewardene* with him), for appellant,—

The Commissioner is wrong in holding that the defendant is not liable in damages to the plaintiff for the injuries caused by his dogs.

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The case of *Folkard v. Anderson* (*Rámanáthan, 1860–62, p. 68*) settles the question. The law is also stated in *Voet, IX. tit. 1, p. 538 ;* also in *Van Leeuwen's Commentaries, bk. IV. ch. 39,* § *6.*

Bawa, for respondent,—

The defendant is not liable, because the calf was in a place where it ought not to have been, and the plaintiff contributed to the accident by which the injury was occasioned. The rule that the owner of a dog is liable for injuries which it caused to another's animal, whether or not the owner knew of the vicious propensities of the dog, must be taken with the limitation that the animal injured was lawfully at the place where it received the injury (*footnote at p. 324 of Kotze's translation of vol. II. of Van Leeuwen's Commentaries, edition of 1886*). The presence of the calf on the high road was a violation of section 94 of Ordinance No. 10 of 1861, it being an offence to turn loose an ox, horse, &c., on a high road.

24th July, 1895. Bonser, C.J.—

The facts are not really in dispute. The defendant is the owner of a pack of hounds : he had been out hunting with them, and was returning home in company with his brother with the hounds along the high road. On their way they passed the plaintiffs' house, which stands close to the road. The calf had strayed on the road ; the hounds seized it, and in spite of all the efforts of the defendant and his brother to prevent the hounds attacking the calf, tore it to pieces. The defendant, on finding out who the owner of the calf was, seems to have acted as a man of good feeling would act. Seeing that his hounds had caused the death of this calf, he wrote to the plaintiff and offered her Rs. 20, at which he estimated the value of the calf, and an apology for what had happened.

But it appears that the loss of the calf itself was not the only damage that resulted from the act of the hounds. The cow, the mother of the calf, which was giving milk, owing to the loss of the calf, suddenly ceased to give milk. It is stated to be a well known fact that in Ceylon milch kine, if they lose their calf, cease to give milk, and that therefore the death of the calf necessarily occasioned further damage by reason of the loss of milk. The plaintiff therefore declined to accept the Rs. 20 offered, and claimed an additional sum of Rs. 80 for loss of the milk.

I think that under the circumstances the loss of the milk was

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1895.

Bonser, C.J.

a natural and probable consequence of the death of the calf, and therefore, if the defendant was liable for the death of the calf, he must be liable for these further damages.

The question, therefore, which we have to consider is, whether the defendant is liable for the death of the calf. The law which governs the case of injuries caused by animals is the Roman-Dutch law, which differs from the English law. The law will be found stated in *Voet, bk. IX. tit. 1*, under the heading *Si quadrupes pauperiem fecisse dicatur*, and, shortly speaking, it is this, that if an animal of an ordinarily gentle disposition commits any damage without any fault on the part of its owner, or without any provocation on the part of the person or animal injured, the action *de pauperie* lies at the suit of the person injured or the owner of the animal injured, against the owner of the animal which inflicted the injury. That action is a noxal action, that is to say, it is open to the defendant, instead of paying the damage, to hand over the animal to the plaintiff in satisfaction of his claim; but if he did not hand over the animal, he was liable to pay whatever damage was assessed. If, however, there was any fault on the part of the owner of the animal, if he had incited the animal to commit the injury, or if he had taken the animal to a place where it ought not to be, or if he had not held the animal in when another man might have done so, or was in any other way in fault, then the *actio de pauperie* would not lie, but he was liable under the *lex aquilia* to the full amount of the damage, and could not avail himself of the privilege of giving up the animal in compensation.

In the present case, it was said that the defendant was not liable because the calf was wrongfully on the highway, and reliance was placed upon a note in the English translation of *Van Leeuwen's Commentaries of the Roman-Dutch Law, vol. II., p. 324*, where the translator, the Chief Justice of the Transvaal, who is an eminent jurist, limits the general proposition as stated in the text of *Van Leeuwen* by this qualification, that the animal injured was lawfully at the place where it was injured, and for this qualification he refers to a case decided by the High Court of the Cape Colony. Unfortunately we have not got a report of that case. which it is quite possible to give that qualification a meaning not inconsistent with the law laid down by *Van Leeuwen*. It may be that, if the injured animal was trespassing on the property of the owner of the animal which did the injury, the owner would not be liable. But the facts of this case show nothing of that kind. As far as the defendant was concerned, the calf was lawfully in the place where it was injured.

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Then it was suggested that its presence on the road was unlawful under section 94 of the Ordinance No. 10 of 1861, which renders it an offence to turn loose, or suffer to be turned loose, any ox, sheep, or goat on any road, but this calf was not an ox, nor was there any evidence that it was turned, or suffered to be turned loose on the road.

Then it was suggested—and it was the ground apparently on which the Commissioner decided against the plaintiff—that the plaintiff was guilty of contributory negligence by allowing the calf to be on the road untended. It seems to me that this defence cannot avail the defendant. Assuming that there was negligence in not having the calf attended by some one, yet the negligence, if it is to be a defence, must be shown to have contributed directly to the death of the calf.

There is no evidence to show that, if some one had been there in charge of the calf, the hounds would not have killed it. If the defendant and his brother could not prevent the hounds from killing the calf, it is not likely that anybody else would have been able to prevent it. This defence, if valid, would lead to this result: that all persons must cease to use the high road for the passage of calves and such-like animals when the defendant's pack of hounds is likely to pass that way. That is a proposition which refutes itself.

I therefore hold that the defendant is liable for the death of this calf, and that he is liable to the amount of damages claimed by the plaintiff.

But as a matter of fact the question of the defendant's liability was never in dispute.

Two issues were framed by the Judge—first, did the action lie? which he decided in favour of the plaintiff; second, if it did lie, what was the amount of damages?

The only issue on which evidence was given was that as to the *quantum* of damages, and it appears to me that the Commissioner was wrong, after trying the question as to the *quantum* of damages, in turning round and dismissing the action without giving the parties an opportunity of adducing evidence on the issue of liability. In fact, he decided against the plaintiff without hearing her. The only evidence given for the plaintiff was evidence as to the amount of damages.

I may mention that in the case of *Folkard v. Anderson* (*Rámanáthan's Reports, 1860—62, p. 68*) the law on this subject of injuries by animals is fully laid down. There is, however, one statement in the judgment in that case which I think the authorities hardly support. It is there stated that the limit of

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1895.

BONSER, C.J.

the liability of an innocent owner is that the amount to be given for compensation must not exceed the value of the animal which did the injury. I doubt whether that is a correct statement of the law. My impression is that there is no such limit to the amount of compensation. It is the duty of the Court to award the amount of damages, whatever that may be, and the only way by which the defendant can escape the payment of the full amount of the damages is by surrendering the animal which caused the injury.

1895.
July 26.

BALTHAZAR *v.* GUNAWARDANA.

P. C., Galle, 17,318.

Penal Code, s. 199—Intentional omission to give information of offence—Criminal Procedure Code, s. 24—Duty of police officer—Mistake—Punishment.

Where a headman, who had received information that A had comitted rape on B, omitted to inform the nearest Police Magistrate of the same, and it appeared that such omission was due to the belief that, as the parties were willing to settle the matter by marriage so as to avoid the disgrace of a public exposure, he was not bound to communicate the information,—

Held, the offence of the headman was, in the circumstances, committed under a mistake as to his duty, and that his punishment should be therefore nominal.

The facts of this case appear in the judgment of the Supreme Court.

Dornhorst and *Alwis*, for defendant appellant.

26th July, 1895. BONSER, C.J.—

The appellant in this case has been found guilty of "omitting "to give information he was legally bound to give" under section 199 of the Penal Code, and sentenced to pay a fine of Rs. 50, or in default of payment to undergo six weeks' rigorous imprisonment. There is evidence that it is the duty of the appellant, as a police officer, to give information to the nearest Police Magistrate of every offence that is provided by section 24 of the Criminal Procedure Code. The offence as to which this appellant omitted to give information was rape. It appears that the young woman

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complained to the Mudaliyár, who is the superior of the police officer, that she had been ravished by her cousin Janis. The Mudaliyár had the young man arrested and sent him to the appellant to deal with the case. The parties were evidently willing to settle the matter by the very natural method of the young man marrying the young woman. The Mudaliyár said that he could not allow an amicable settlement. Then they go to the house of the young woman, a sort of conference is held, and the relations being willing to settle the matter by the young man marrying the girl, notice of an intended marriage between the parties is accordingly given to the Registrar on the same day. However, before the day, Janis absconded, and thereupon these proceedings were taken against the appellant for not reporting the information he had received to the nearest Police Magistrate. There is no doubt that the appellant did receive information of the alleged rape, because the evidence shows that the girl did make a complaint to him that she had been ravished, and that the overtures for a settlement were made in his presence. It is admitted that no report was made; but I think, under the circumstances, the parties being willing to settle, to avoid the disgrace of a public exposure of the young woman's shame, that the appellant might have reasonably believed that he was not bound to report the matter. At the same time, the law is clear that he ought to have made a report.

The Magistrate has sentenced the appellant to pay a fine of Rs. 50, or in default of payment to undergo six weeks' rigorous imprisonment. The offence under the circumstances was a technical offence, and I think that a nominal fine of Re. 1 will meet the justice of the case.

It must not be understood that I shall regard with leniency a case in which crime has been deliberately suppressed. This Court will visit with severity any case of deliberate suppression of information as to crime. The present case I consider is one in which the appellant made a mistake as to his duty.

Sentence modified.

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LE MESURIER *v.* LE MESURIER *et al.*

D. C. Mátara, 502.

Marriage between British or European spouses resident in the Island—Matrimonial law of Ceylon—Proclamation of 23rd September, 1799—Charters of 1801 and 1833—Scope of s. 597 of Civil Procedure Code—Applicability of Roman-Dutch law—Authority of International law in the consideration of jurisdiction of Courts—Remedies for matrimonial misconduct allowable by Courts of the residence of the spouses—Action for divorce—for judical separation—for alimony.

The matrimonial law of Ceylon, established by the Proclamation of 23rd September, 1799, was superseded, or at least modified, in so far as it related to British and European residents, by the enactments of the Royal Charter of 1801. But upon the repeal of those enactments by the Charter of Justice of the 18th February, 1833, the Proclamation of 1799 was revived, and the matrimonial law applicable to such residents again became the Roman-Dutch law.

The Roman-Dutch law does not give jurisdiction to the Courts of the country in which spouses domiciled elsewhere are for the time resident, to entertain a divorce suit.

Neither does section 597 of the Civil Procedure Code, nor did previous enactments to a similar effect, empower a District Court to entertain any divorce suit which was not previously cognizable by the Courts of the Island.

According to international law, which is authoritative in the absence of any municipal law to the contrary, the true domicile of the married pair, as distinguished from their so-called matrimonial domicile, affords the only test of jurisdiction to dissolve their marriage; and the Courts of England will not recognize as effectual the decree of a foreign court divorcing spouses who at its date had their domicile in England.

But though a District Court of the Island cannot decree a dissolution of marriage in the case of such residents, yet it may, under the rules of international law, administer other remedies for matrimonial misconduct, such as judicial separation on the ground of cruelty, and alimony for desertion.

THE plaintiff in this case appealed to Her Majesty the Queen in Her Privy Council against the judgment of the Supreme Court delivered on the 29th June, 1895, setting aside the judgment of the District Court of Mátara, and dismissing plaintiff's action with costs.

The facts of the case are fully set forth in the judgment of the Lords of the Judical Committee of the Privy Council, namely :—

The LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR R. COUCH.

Their judgment was delivered by Lord Watson, as follows :—

In February, 1883, the appellant, who is a member of the Ceylon Civil Service, was married in England to a French lady, the leading respondent in this appeal, who will hereinafter be

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referred to as "the respondent." From the date of their marriage until the commencement of this suit the spouses had their principal residence in Ceylon, where the appellant was necessarily detained by his official duties. In July, 1892, he was Assistant Government Agent of the District of Matara ; and on the 12th of that month he brought the present action before the District Court of Matara against his wife and three other defendants, praying for a divorce *a vinculo matrimonii* and other remedies, upon the allegation that she had committed adultery with one of these defendants in the year 1887, with another of them in the year 1889, and with the third of them at various times between May, 1891, and April, 1892. Except on the last of these occasions, when the adultery was alleged to have taken place at Kandy, none of these matrimonial offences was said to have been committed within the jurisdiction of the Courts of Ceylon. The *loci* assigned for these acts on the two other occasions were, on the first the steamship *Goorkha*, during a voyage from England to Colombo, and on the second the steamship *Ravenna*, during a voyage from Colombo to Marseilles, and a hotel at Marseilles and in Paris.

In her defence the respondent pleaded that the District Court had not jurisdiction to entertain the suit. Upon the merits she denied all three charges of adultery, and, with respect to the first charge, pleaded alternatively that it had been condoned by the appellant. Two of the other defendants, who are alleged to have been participant in her adulterous acts on the first and third occasions, also lodged defences, denying the charges made against them, and pleaded that they were not subject to the jurisdiction of the Court. The defendant in the first charge also set up the plea of condonation.

The appellant is an Englishman by birth ; and at the time when this action was instituted, although officially resident within the District of Matara, he admittedly retained, and still continues to retain, his English domicile of origin. He had previously brought a divorce suit, founded on the same charges of adultery, and directed against the same parties, before the Divorce Court in England, and these proceedings appear to be still in dependence. At the time when they were cited to appear in the District Court of Matara no one of the three persons, who are co-defendants with the respondent, was resident in, or was alleged by the appellant to have any connection with the Island. They are described in his plaint as "of Calcutta, India," and "of London, England."

The District Judge ruled that jurisdiction to proceed in the suit was conferred upon him by section 597 of the Civil Procedure

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1895.

PRIVY COUNCIL.

Code, No. 2 of 1889, an enactment which their Lordships will have occasion to notice more fully. The case accordingly went to trial before him; and, on considering the evidence, he found that the first charge of adultery had been proved, but that it had been condoned by the appellant, and that the second and third charges had also been established. In respect of the latter findings, he granted a *decree nisi* to become absolute in four months, unless good cause were shown against it. On appeal to the Supreme Court that order was reversed, and the appellant's suit dismissed with costs.

Acting Chief Justice LAWRIE and Acting Puisne Justice BROWNE, who constituted the Court of Appeal, based their judgment upon two independent grounds. They held, in the first place, that the Courts of Ceylon had no jurisdiction to dissolve a marriage between British or European spouses resident in the Island. Such jurisdiction appeared to them to be expressly excluded by section 53 of the Royal Charter of the 18th April, 1801, which enacted that the jurisdiction of the Supreme Court of the Island, at that time the only Court competent to try matrimonial causes, should be exercised "towards and upon all the Dutch inhabitants of the said town, "fort, and district, according to the laws and usages in that behalf "in force at the time the said settlements, territories, and depen- "dencies came into our possession; and towards and upon the said "British and Europeans, and licensed persons hereinbefore described "resident in any the said settlements, territories, and dependencies, "the Ecclesiastical law, as the same is now used and exercised in "the Diocese of London in Great Britain." That enactment applied to British residents in Ceylon the matrimonial law of England as it existed in the year 1801; and if it had stood unaltered, the conclusion of the learned Judges would have been irresistible. They held, in the second place, that the second and third charges of adultery, which were subsequent to condonation, had not been established by the evidence.

Their Lordships, in deciding this appeal, must observe the limits which the law of Ceylon imposes upon the matrimonial jurisdiction exercisable by the tribunal before which the action was originally brought. It therefore becomes necessary to consider whether the District Court of Matara was competent to entertain the action and to pronounce decree of divorce *a vinculo*. To that point, which is one of some importance to British and other European residents in the Island, the arguments of counsel on both sides of the bar were exclusively directed.

Jurisdiction in matrimonial causes, which, by the Royal

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Charter of 1801, was vested in the Supreme Court of Judicature, has by subsequent legislation been extended to the District Courts of the Island. The last of a series of enactments to the same effect is to be found in section 597 of the Procedure Code of 1889, which provides that "any husband or wife may present a plaint to the "District Court within the limits of which he or she, as the case "may be, resides, praying that his or her marriage may, by the law "applicable in this Colony to his or her case, be dissolved." The enactment, like those which preceded it, refers to procedure only, and distributes the matrimonial jurisdiction which may be competently exercised by its tribunals among the various Courts of the Colony. The Judge of the District Court assumed that it gave him jurisdiction to try the present case, but it is clear that neither section 597 of the Code, nor previous enactments to a similar effect, empowered him to entertain any divorce suit which was not previously cognizable by the Courts of Ceylon.

If section 53 of the Charter of 1801, upon which the learned Judges of the Supreme Court relied, had continued in force, it would have been beyond the competency of the District Court of Matara to give the appellant a more stringent remedy than a separation *a mensâ et thoro*. But it does not appear to have been brought under the notice of the Appellate Judges that the whole clauses of the Charter of 1801, including section 53, were revoked and annulled by the Ceylon Charter of Justice of the 18th February, 1833. Since that date there has been no legislation regulating the jurisdiction of the Courts of Ceylon in matrimonial causes arising between British or European spouses. In these circumstances, it becomes necessary to consider, in the first place, what is the present law of the Island by which such jurisdiction is regulated; and, in the second place, whether, according to that law, the present suit is maintainable.

The first of these questions appears to their Lordships to admit only of one answer. After the annexation of the Dutch Settlements in the Island of Ceylon to the British Crown, a commission was granted on the 19th April, 1788, to Frederick North, appointing him to be Governor and Commander-in-Chief, and containing instructions to him with respect to the administration of justice and other matters. In pursuance of these instructions, the Governor issued a Royal Proclamation, promulgated at Colombo on the 23rd September, 1799, which declared that the administration of justice and police was thenceforth and during His Majesty's pleasure to be exercised by all Courts of Judicature, Civil and Criminal, "according to the laws and institutions that subsisted under "the ancient government of the United Provinces, subject

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1895.

PRIVY COUNCIL.

"to such deviations and alterations by any of the respective powers "and authorities hereinbefore mentioned, and to such deviations "and alterations as We shall by these presents, or by any future "Proclamation, and in pursuance of the authorities confided to Us, "deem it proper and beneficial for the purposes of justice to ordain "and publish, or which shall or may hereafter be by lawful "authority ordained and published."

The Matrimonial law of the Colony, established by the Proclamation of 1799, was superseded, or at least modified, in so far as it related to British and European residents, by the enactments of the Royal Charter of 1801. But it does not appear to their Lordships to admit of doubt that, as soon as these enactments were swept away by the legislation of 1833, the Proclamation was restored to its original force, and the matrimonial law applicable to British or European residents in Ceylon again became the Roman-Dutch law which had prevailed in the Colony before its annexation.

Accordingly, the præjudicial question which their Lordships have to decide is, whether the Roman-Dutch law, or any modification of it introduced into the Colony before the year 1798, gives the Courts of the Island jurisdiction to dissolve a marriage contracted in England by British subjects, who, though resident within the forum, still retain their English domicile. No authority can have a material bearing upon that point which does not relate to the dissolution of marriage; because there are unquestionably other remedies for matrimonial misconduct, short of dissolution, which, according to the rules of the *jus gentium*, may be administered by the Courts of the country in which spouses, domiciled elsewhere, are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her; and, in cases where the residence is of a more permanent character, and her husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicile of the parties. But the considerations which justify the Courts of the residence in administering remedies for the protection of mutual rights incidental to marriage, which do not involve disruption of the marriage bond, have little or no application to proceedings taken for the purpose of putting an end to the marriage, and remanding the spouses to the condition of single persons.

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1895.

PRIVY COUNCIL.

In order to sustain the competency of the present suit, it is necessary for the appellant to show that the jurisdiction assumed by the District Judge of Matara was derived, either from some recognized principle of the general law of nations, or from some domestic rule of the Roman-Dutch law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of International law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. The opinions expressed by the English Common Law Judges in *Lolley's* case (*2 Russ and Ry. 237*) gave rise to a doubt, whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled; and the law of England was, in their Lordships' opinion. correctly stated by Lord Westbury in *Shaw v. Gould* (*3 E. & I., Ap. 85*), in these terms:—"The position that the tribunal of a "foreign country having jurisdiction to dissolve the marriages of "its own subjects, is competent to pronounce a similar decree "between English subjects who were married in England, but "who before and at the time of the suit are permanently domiciled "within the jurisdiction of such foreign tribunal, such decree being "made in a *bona fide* suit without collusion or concert, is a position "consistent with all the English decisions, although it may not be "consistent with the resolution commonly cited as the resolution "of the Judges in *Lolley's* case." On the other hand, a decree of divorce *a vinculo*, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses are amenable, claim extra territorial authority.

Mr. Mayne, in his elaborate and able argument for the appellant, did not assert the existence of any special rule in the Roman-Dutch law giving jurisdiction to entertain a divorce suit in such circumstances as occur in the present case. He maintained that in addition to jurisdiction arising from the fact of the spouses having their domicile of succession within the territory, which he admitted to be universally acknowledged, the general law of nations recognizes that a concurrent and equally effective jurisdiction to divorce is created by the spouses' residence within the territory of such permanence as to constitute what has been "termed a matrimonial domicile," although not of sufficient

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1895.

PRIVY COUNCIL.

permanence to fix their true domicile there. In support of the theory of a matrimonial domicile, as distinguished from the domicile of succession, the learned counsel relied mainly, if not exclusively, upon certain decisions by the Courts of England and Scotland, which he represented as conclusive in his favour. Their Lordships will at once proceed to examine these authorities, beginning with the English cases which do not appear to them to be either consistent or satisfactory. The Scotch cases are not, in their Lordships' opinion, more satisfactory than the English ; but, so far as they go, they have at least the merit of consistency.

The first in date of the English cases is *Tollemache v. Tollemache* (*1 S. & T. 557*), which was decided by Williams, J., Martin, B., and the Judge Ordinary. The suit was for divorce at the instance of the husband, who was throughout a domiciled Englishman. The parties were first married at Gretna Green, and thereafter entered into a regular marriage in London in August, 1837. From that date, with the exception of occasional visits to England and Wales, they resided continuously in Scotland ; and on the 3rd of July, 1841, the husband obtained a decree of divorce from the Scotch Courts of adultery of the wife committed in Scotland. In her answer to the English suit, which was instituted eighteen years afterwards, the wife also prayed the Court for a decree, declaring her marriage with the petitioner to be dissolved. The Court granted decree of dissolution, with the observation :—" Sitting " here as an English Court, we cannot recognize that divorce " (*i.e.*, the Scotch) as putting an end to the marriage bond of a " domiciled Englishman."

The next case in order, *Yelverton v. Yelverton* (*1 S. & T. 574*), was a suit at an alleged wife's instance for restitution of conjugal rights, which was dismissed by the Judge Ordinary. The husband, who was called as respondent, was not resident, and had never been domiciled in England.

Their Lordships have noticed these cases because they were founded upon in the argument addressed to them. They need hardly observe that in neither of them was any question raised in regard to matrimonial domicile. In *Tollemache v. Tollemache* it might very well have been contended that four years' residence there have given the spouses a matrimonial domicile in Scotland ; but that view of the law does not seem to have occurred either to the parties or to the Bench.

In the next case, *Brodie v. Brodie* (*2 S. & T. 259*), the petitioner, being the husband, was resident, but had not his domicile in England. He had been married to the respondent in Tasmania, and left her behind him in Melbourne, when he came to

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Great Britain. His wife never came to England, and the acts of adultery charged in his petition were committed in the colony. In giving decree, the Court, consisting of the Judge Ordinary, with Wightman and Williams, J.J., observed:—" We think that the petitioner was *bona fide* resident here, not casually, or as a traveller; after he became resident here, his wife was carrying on an adulterous intercourse in Australia. He is, therefore, entitled to a *decree nisi* for a dissolution of his marriage." These observations go the whole length of affirming that the residence of the husband in a country where he has not a domicile, if such residence be not casual or that of a traveller, gives the Courts of that country divorce jurisdiction over him, and also over his wife, although she should continue to reside in the country where they both have their domicile of succession.

In *Manning v. Manning* (*2 P. & D. 223*), the Judge Ordinary dismissed a petition for divorce at the instance of an Irish husband, upon the ground that he was not a *bona fide* resident in England.

The next authority adduced for the appellant was *Wilson v. Wilson* (*2 P. & D. 435*), which their Lordships notice because of its connection with a Scotch case between the same parties to which they will have occasion to refer. At the time of their marriage in 1861 both the spouses had their domicile of origin in Scotland, and they continued to reside there until November, 1866, when the husband discovered that the lady had been guilty of adultery. He then went to England and lived there with his mother until April, 1871, when he presented his petition to the Judge Ordinary. During its dependencies he brought an action in the Court of Session, and obtained a decree of divorce, after it had been found that he was still domiciled in Scotland. Lord Penzance, upon the evidence before him, held that the petitioner had, in April, 1871, acquired an English domicile, and he accordingly pronounced a similar decree, upon the ground that the Scotch Courts had no jurisdiction. No question as to what is called matrimonial as distinguished from true domicile was raised in the case. The petitioner was admittedly resident in England, and was found to have his domicile there; but Lord Penzance, in delivering judgment, expressed his opinion to the effect that actual domicile afforded the only true test of jurisdiction in such cases.

The last, and not the least important of the English authorities requiring to be considered is *Niboyet v. Niboyet* (*3 P. D. 1*). Shortly stated, the facts were these. A Frenchman and an English woman were married at Gibraltar in the year 1856. In 1875

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the husband went to Newcastle-on-Tyne, and continued to reside there until October, 1876, when his wife filed a petition in the Divorce Division of the High Court of Justice, alleging adultery, coupled with desertion, for two years and upwards. It was admitted that the respondent, being in the Consular service of France, had never lost his domicile of origin. The Judge Ordinary (Sir R. Phillimore) held that he had no jurisdiction to dissolve the marriage (*3 P. D. 52*). On appeal his judgment was reversed by James and Cotton, L.J.J., the present Master of the Rolls (then Lord Justice Brett) dissenting. The main reason assigned for their decision by the learned Judges of the majority was that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce *a mensâ et thoro*, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe section 27 of the Act of 1857 as giving the English Court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court.

The only Scotch authority cited by Mr. Mayne was *Pitt v. Pitt* (*1 Sess. Ca. 3rd series 103, and 4 Macq. Ap. Ca. 627*). But in order to ascertain whether, and if so to what extent, the doctrine of matrimonial domicile is regarded in Scotland as a good foundation for the exercise of divorce jurisdiction, their Lordships find it necessary to refer to the other cases in which the doctrine has been applied or discussed by a Scotch Court. Although the Matrimonial Courts of Scotland had previously exhibited no lack of ingenuity in discovering grounds for exercising divorce jurisdiction in cases where the parties had their domicile elsewhere, it was not until the year 1862 that the idea of a matrimonial domicile, other than true domicile, and resting upon a somewhat indefinite permanency of residence, which had been foreshadowed in *Shields v. Shields* (*4 Sess. Ca. 2nd series 142*), was first formulated and applied in *Jack v. Jack* (*24 Sess. Ca. 2nd series 467*).

In that case both spouses were Scotch, and after their marriage

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they continued to live together in Scotland until the year 1855, when the husband went to America and became a Minister of the Gospel at Newburgh, in the State of New York, the wife continuing to reside in Scotland. Four and a half years afterwards the husband, who was still in America, brought his action founded on adultery committed by his wife in Scotland. It was met by the plea of no jurisdiction, and was heard before twelve Judges of the Court of Session, who upheld the jurisdiction of the Court by a majority of eleven to one. The late Lord President Inglis (at that time Lord Justice Clerk) went upon the ground of matrimonial domicile, which he thus defined :—"The true inquiry, I apprehend, "in every such case is, where is the home or seat of the marriage "for the time; where are the spouses actually resident if they be "together; or, if from any cause they are separate, what is the "place in which they are under obligation to come and renew, or "commence, their cohabitation as man and wife?" Five other Judges took substantially the same view expressed in different language. Lord President McNeill, with two of their Lordships, concurred in the judgment, holding that the domicile of the married pair had never been transferred to any other country. Lord Kinloch and Lord Jerviswoode intimated their opinion that the true domicile of the husband was the only test of jurisdiction, but held that the husband was not shown to have lost his Scotch domicile. Lord Deas held that there was no jurisdiction, because the pursuer had acquired a new domicile in the United States. With regard to the matrimonial domicile, which found favour with some members of the Court, his Lordship observed :—"Neither "can I solve this case by what has been sometimes called the domicile "of the marriage. The phraseology appears to me to be calculated "to mislead. It is figurative, and wants judicial precision. There "is no third domicile involved apart from the domicile of the "husband and the domicile of the wife. Domicile belongs ex- "clusively to persons. Having ascertained the domicile of the "husband and the domicile of the wife, the inquiry into domicile "is exhausted."

The doctrine of matrimonial domicile, as explained by the Lord Justice Clerk in *Jack v. Jack*, was subsequently applied by his Lordship and the other Judges of the Second Division in *Hume v. Hume* (*24 Sess. Ca. 2nd series 1342*), where they granted a decree of divorce for adultery to a wife whose husband had been in America for seventeen years, and was living with a woman whom he had married there.

The next case, which is also the last case in which the so-called matrimonial domicile has been made the ground of divorce

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1895. PRIVY COUNCIL.

jurisdiction in Scotland, is *Pitt v. Pitt*, already mentioned. In that case, Colonel Pitt, a domiciled Englishman and married there, went to Scotland, chiefly for the purpose of avoiding his creditors, leaving his wife in London. With the exception of occasional visits, in disguise, to relatives in England, he continued to reside in the Hebrides for six years, and then brought an action for divorce on the ground of adultery. His wife, who had never been in Scotland, appeared to defend, and pleaded that, her husband being domiciled in England, the Court of Session had no jurisdiction. After proof, the Lord Ordinary (Kinloch) found that the pursuer had acquired a domicile in Scotland, and gave him decree of divorce. His decision was affirmed by the Second Division of the Court, who, differing from him on that point, came to the conclusion that the pursuer still retained his English domicile, but held that his residence in Scotland had been of such a character as to make that country the domicile of the marriage. On appeal to the House of Lords, these judgments were reversed, and the defender assoilzied from the conclusions of the action. At the bar of the House, the pursuer's counsel (Sir R. Phillimore, then Queen's Advocate, and Sir Hugh Cairns) intimated that "they had come to the resolution of abandoning as untenable the "ground on which the Second Division of the Court of Session "had rested their decision, namely, that divorce *a vinculo* might be "validly granted to strangers not domiciled, though temporarily "resident, within the jurisdiction." They accordingly confined their argument in support of the judgments appealed from to an endeavour to show that Colonel Pitt had acquired a Scottish domicile. The Lord Chancellor (Westbury), in delivering judgment, referred to the course taken by counsel in these terms :—"If he was not "domiciled in Scotland to all intents and purposes, having relin- "quished his original domicile and acquired a domicile in Scotland, "then by the concession of the counsel at the bar, a concession "which is, I trust, in the opinion of your Lordships, quite in "accordance with the law of the case, it will be impossible to "maintain the order which has been prononuced on the Court "below." Neither Lord Chelmsford nor Lord Kingsdown, who sat with the Lord Chancellor, took any exception to that statement.

After the observations made by Lord Westbury in *Pitt v. Pitt*, from which the other noble and learned Lords present did not express dissent, it would be very rash to affirm that, according to the law of Scotland, mere matrimonial domicile affords any ground for jurisdiction to divorce. There is no trace of the doctrine to be found in the Institutes of Scottish law, or in the

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earlier decisions of the Court; and, during the thirty-one years which have elapsed since the case of *Pitt v. Pitt* was decided by the House of Lords, the divorce jurisdiction of the Court of Session has never been exercised on that ground. It has, however, been twice referred to since that date—first, in the year 1872, in *Wilson v. Wilson* (*10 Sess. Ca. 3rd series 573*): and again, ten years afterwards, in *Starvet v. Stavert* (*9 Sess. Ca. 4th series 529*).

In *Wilson v. Wilson* the parties were the same as in the English case already noticed. On his finding that his English suit was met by the plea that he retained his Scottish domicile, the husband brought an action of divorce in the Court of Session, and was there met by the plea that he had acquired an English domicile. The Lord Ordinary, whose judgment was affirmed by the First Division, found that he was domiciled in Scotland, and, notwithstanding the dependence of the English suit, granted decree of divorce. In the note appended to his judgment the Lord Ordinary (Ormidale) observed, that "having regard to the judgment in the House of "Lords in *Pitt v. Pitt* in April, 1864, any such thing as a consistorial "or matrimonial domicile must be held to be unknown to the law." In delivering the judgment of the Inner House, Lord President Inglis said:—"In cases of divorce, jurisdiction depends upon "domicile, and the domicile in this case is here. And if the domicile, "and consequently the jurisdiction, is here, they can be nowhere "else. I have always been of opinion, as I expressed myself in the "case of *Pitt*—and I have never seen any reason to change that "opinion—that for the purposes of divorce there may be a matri- "monial domicile, differing from the absolute domicile which will "rule succession," Their Lordships find it difficult to reconcile these statements. If there really were such a thing as a matrimonial domicile recognized by general law, it is not easy to comprehend why the jurisdiction could be nowhere else than in Scotland. On that assumption the pursuer had certainly acquired a matrimonial domicile in England by five years' continuous residence there; and, in deference to international rules, the Scotch Court ought not to have entertained the same *lis* which was already pending in the proper Court of the matrimonial domicile.

In *Stavert v. Stavert* the Lord Ordinary refused to grant a divorce to a foreigner who had come to Scotland with his paramour and had lived there for five months, with the sole object of obtaining a divorce from his wife. The pursuer maintained, alternatively, that he had acquired either a real domicile or a

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1895,

PRIVY COUNCIL.

matrimonial domicile in Scotland. The Lord President (Inglis) held that he was possessed of neither; and with reference to matrimonial domicile his Lordship said:—"There has been a "good deal of speculation on this point, but fortunately it is not "necessary to deal with the question here. It has not yet been "decided in the Court of last resort." Lord Deas reiterated the views which he has expressed in *Pitt v. Pitt;* and Lord Shand, dealing with the same subject, said:—"I have great difficulty "in finding any sound principle of general application which "would induce foreign Courts to give weight to a decree in "his country based on such jurisdiction; and I have, further, "great difficulty in finding any rule or standard as to the "nature and extent of the residence which would be necessary or "sufficient to found such a jurisdiction."

When carefully examined, neither the English nor the Scotch decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognized rule of general law, to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage.

Tollemache v. Tollemache, which was decided by three Judges in 1859, shortly after the passing of the Divorce Act, appears to be an authority to the contrary. The learned Judges sustained the jurisdiction of the English Court, which was the forum of the husband's domicile, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicile in Scotland, where he had *bona fide* resided for four years with his wife, neither casually, nor as a traveller. Then in *Brodie v. Brodie*, in the year 1861, three learned Judges decided the opposite, holding that residence of that kind, which had been found in *Tollemache v. Tollemache* to be insufficient to give jurisdiction to a Scotch Court, where the domicile was English, was, nevertheless, sufficient to give jurisdiction to themselves where the domicile was Australian. In *Wilson v. Wilson* jurisdiction was sustained by Lord Penzance upon the ground that the petitioner had acquired an English domicile, with an expression of opinion by his Lordship that such domicile ought to be the sole ground of jurisdiction to dissolve marriage. In *Niboyet v. Niboyet*, Sir Robert Phillimore expressed a similar opinion, and dismissed the suit of the petitioner, who had a matrimonial domicile in England, which fully answered the definition of such domicile given either in *Brodie v. Brodie* or in *Pitt v. Pitt*. His decision was, no doubt, reversed in the Court of Appeal; but it has the support of the present Master of the Rolls, and their Lordships have already pointed

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out that the judgment of the majority was mainly, if not altogether, based upon a reason which will not bear scrutiny.

The Scotch decisions appear to their Lordships to be equally inefficient to show that a matrimonial domicile is a recognized ground of divorce jurisdiction. So far as they go they are consistent enough, but the doctrine appears to have had a very brief existence because the three cases in which it was applied all occurred between the 7th February and the 14th December in the year 1862. Although, owing to the course taken by the appellant's counsel in *Pitt v. Pitt*, the House of Lords had not an opportunity of expressly deciding the point, there can be little doubt that the approval of the course adopted by counsel, which was openly expressed by Lord Westbury, has had the effect of discrediting the doctrine in Scotland ; and it is impossible to affirm that the Court of Session would now give effect to it. The eminent Judge, who in 1862 was the first to give a full and clear exposition of the doctrine of matrimonial domicile, spoke of it, in the year 1882, not as a doctrine accepted in the law of Scotland, but as matter of speculation.

It is a circumstance not undeserving of notice that the learned Judges, whether English or Scotch, who have expressed judicial opinions in favour of a matrimonial domicile, have abstained from reference to those treatises on International law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance, that nothing could be extracted from these sources favourable to the view which they took. Their Lordships are of opinion that in deciding the present case, on appeal from a Colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked.

Huber (*Lib. 1, tit. 3, s. 2. De Confl. Leg.*) states the rule of International law in these terms :—"*Rectores imperiorum id comiter agunt,* "*ut jura cujusque populi intra terminos ejus exercita, teneant ubique* "*suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque* "*civium præjudicetur.*" That passage was cited with approbation by Lord Cranworth and Lord Westbury in *Shaw v. Gould* (*3 E. and I. Ap. 72 and 81*). To the same effect, but in language more pointed, is the text of *Rodenburg* (*De Stat. Divers, tit, 1, c. 3, s. 4*) cited in the same case by Lord Westbury :—"*Unicum hoc ipsa rei natura ac* "*necessitas invexit, ut cum de statu et conditione hominum quæritur,* "*uni solum modo Judici, et quidem Domicilii, universum in illâ jus* "*sit attributum.*" The same rule is laid down by *Bar*, the latest

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1895.

PRIVY COUNCIL.

Continental writer on the theory and practice of International private law. He says (*Sec. 173, Gillespie's translation, p. 382*) "that in actions of divorce—unless there is some express "enactment to the contrary—the Judge of the domicile or "nationality is the only competent Judge." And he adds:— "A decree of divorce, therefore, pronounced by any other Judge "than a Judge of the domicile or nationality, is to be regarded in all "other countries as inoperative."

There can, in their Lordships' opinion, be no satisfactory canon of International law regulating jurisdiction in divorce cases which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. But any judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. The definitions given in *Brodie v. Brodie* and in *Pitt v. Pitt* appear to their Lordships to be equally open to that objection. *Bona fide* residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile. Residence which is "not that of a traveller" is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveller, is not to be regarded as "casual." So also the place where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveller, or casually, in a country where he has no domicile. Neither the English nor the Scotch definitions, which are to be found in the decisions already referred to, give the least indication of the degree of permanence, if any, which is required in order to constitute matrimonial domicile, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the *jus gentium* would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of International jurisprudence to prevent.

Their Lordships attach great weight to the consideration that the theory of matrimonial domicile for which the appellant contends has never been accepted in the Court of last resort for England and Scotland. The matter does not rest there, because the theory is not only in direct opposition to the clear opinion expressed by Lord Westbury in *Pitt v. Pitt*, but appears to their Lordships to be at variance with the principles recognized by

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noble and learned Lords in *Dolphin v. Robins* (*7 H. L. Ca. 390*) and in *Shaw v. Gould* (*3 E. & I. Ap. 55*). It is true that in these cases, and especially in *Dolphin v. Robins*, there was ground for holding that the spouses had resorted to a foreign country and a foreign tribunal, in order to escape from the law and the Courts of their English domicile. But in both, the international principle, upon which jurisdiction to dissolve a marriage depends, was considered and discussed; and the arguments addressed to their Lordships in favour of matrimonial domicile appear to them to run counter to the whole tenor of the observations which were made by noble and learned Lords in these cases. In *Dolphin. v. Robins*, Lord Cranworth stated that "it must "be taken now as clearly established that the Scotch Court has no "power to dissolve an English marriage, where, as in this case, the "parties are not really domiciled in Scotland, but have only gone "there for such a time as, according to the doctrine of the Scotch "Courts, gives them jurisdiction in the matter." In *Shaw v. Gould*, the *dicta* of noble and learned Lords upon the point raised in this appeal were even more emphatic. Lords Cranworth and Westbury expressed their entire approval of the doctrine laid down by *Huber* and *Rodenburgh* in those passages which have already been cited. Their Lordships did not go the length of saying that the Courts of no other country could divorce spouses who were domiciled in England; but they held that the Courts of England were not bound, by any principle of International law, to recognize as effectual the decree of a foreign Court divorcing spouses who, at its date, had their domicile in England. The other noble and learned Lords who took part in the decision of *Shaw v. Gould* were Lords Chelmsford and Colonsay. Lord Chelmsford did not express any opinion upon the subject of matrimonial domicile. Lord Colonsay rested his judgment upon the fact that the spouses had resorted to Scotland for the very purpose of committing a fraud upon the law of their English domicile; but he indicated an opinion that, in the absence of such faudulent purpose, they might have obtained a valid divorce in Scotland, after a residence in that country which was insufficient to change their domicile of succession.

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to International law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson v. Wilson* (*1 P. and D. 442*), which were obviously meant to refer, not to questions arising in regard

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1895. — PRIVY COUNCIL.

to the mutual rights of married persons, but to jurisdiction in the matter of divorce:—"It is the strong inclination of "my own opinion that the only fair and satisfactory rule to "adopt on this matter of jurisdiction is to insist upon "the parties in all cases referring their matrimonial diffe- "rences to the Courts of the country in which they are "domiciled. Different communities have different views and "laws respecting matrimonial obligations, and a different estimate "of the causes which should justify divorce. It is both just and "reasonable, therefore, that differences of married people should "be adjusted in accordance with the laws of the community to "to which they belong, and dealt with by the tribunals which alone "can administer those laws. An honest adherence to this principle, "moreover, will preclude the scandal which arises when a man "and a woman are held to be man and wife in one country, and "strangers in another."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the order appealed from. The appellant must pay to the first and fourth respondents their costs of this appeal.

Affirmed.

1895. *August 15, 20*

WIJERATNE *v.* PERERA.

P. C., Kurunegala, 3,643.

Ordinance No. 17 of 1889, ss. 5 and 18—Keeping a common gaming-place—Improper use of bagatelle table—Game of "Kurunegala rouge et blanc."

The game of bagatelle sanctioned by the Ordinance No 17 of 1889, section 18, is not the game of "Kurunegala *rouge et blanc.*"

The occupiers of a house keeping a house for the playing of that game for stakes, and to which the public have access, are liable under section 5 of that Ordinance.

THE evidence adduced in this case established that the two accused persons were the occupiers of a house in a thickly populated part of the town of Kurunegala; that there was a bagatelle table in that house; that the house was the nightly resort of all sorts and conditions of persons; that the table was used for the purposes of playing a peculiar game in the following manner; a red ball being placed upon the table at the spot point, a man who held the cue played the white ball against it, and the spectators round the table staked money, some upon the white ball, others upon the red; that the stakes were placed upon the table; and that the accuseds took a share thereof as their

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commission, leaving the remaining money to be divided among the winners according as the white or the red ball fell into any one of the holes in the table. 1895. *August 15, 20.*

The Police Magistrate convicted the accused of keeping a common gaming-place, and thereby committing an offence under section 5 of the Ordinance No. 17 of 1889, and sentenced them to pay a fine of Rs. 250 each.

They appealed.

Dornhorst and *Roberts*, for appellant.

Rámanáthan, S.-G., for respondent.

Cur. adv. vult.

20th August, 1895. BROWNE, J.—

It is very patent that the accused have sought—under the protection given by the Gaming Ordinance, 1889, section 18, to the game of bagatelle—to keep or use for their own profit a common gaming-place, whereat on a bagatelle table a game (which after this prosecution will perhaps be known as "Kurunégala *rouge et blanc*") was, according to the evidence, played in the following manner :—

The red ball being spotted, Horatella, a carter, who alone and always throughout the fifteen minutes when the witnesses were present handled the cue, played the white ball against it. The spectators standing on either side of the table had made bets, placing their money on either side of the table, whether the red ball or the white ball would fall into a hole. If both balls fell in, they were taken out and the stroke was repeated. When only one ball had on the first or after the repeated stroke fallen into a hole, those who staked their money on that coloured ball falling into the hole took their money. The bets were of various sums up to 50 cents. The two accuseds, father and son, stood on either side of the table, and before each game was commenced took as commission 3 cents out of each 25 cents staked, *i.e.*, 6 cents out of each 25 cents bet. Five or six such games were played in the fifteen minutes.

Appellants called no witnesses out of the thirty or forty Sinhalese, Tamil, Moor, and Malay frequenters of their *salon* on this occasion to depose to the game being other than what the witnesses for the prosecution described. In their petition of appeal they submit that the stroke of white on red so described is but the first stroke at bagatelle, and that this limitation of the game to a series of repetitions of first stroke is only such a variation of the ordinary game as pyramids and snookers may be

1895. August 15, 20.

considered to be of the game of " billiards," which the Ordinance leaves legitimate. It is inadvisable now to hazard any opinion whether those variations would be so protected. Probably those who are in doubt on the point will not play them for cash betting or stakes. But the judgment of the Police Magistrate, that this Kurunégala *rouge et blanc* is not the game of bagatelle sanctioned by the Ordinance, is one which I affirm. For this, which I believe to be the first conviction of the kind, I reduce the sentence to Rs. 100 fine, and in default three months' rigorous imprisonment.

1895. Sept. 3, 5.

WICKRAMASOORIYA *v.* APPUSINHO.

P. C., Balapitiya, 14,269.

Appeal—Computation of time—Criminal Procedure Code, s. 406.

In calculating a period within which an act is required to be done, the day from or after which such period is to be commenced is excluded, and the last day of such period included.

ON the 23rd August, 1895, the accused was convicted. He tendered his petition of appeal on the 2nd September, but the Police Magistrate refused to accept and forward it to the Supreme Court on the ground that it was tendered a day too late.

Pereira, for the accused, moved the Supreme Court for an order on the Police Magistrate to transmit the record of the case in appeal to the Supreme Court, in terms of section 409 of the Criminal Procedure Code. He cited *Chitty's Arch. Prac., Q. B. D., vol. II., p. 1435,* and *Young v. Higgon, 6 M. & W. 49.*

Cur. adv. vult.

5th September, 1895. BROWNE, A.P.J.—

When time from, after, or within a certain time of a particular period is allowed to do an act, the first day is excluded (*Chitty's Arch. Prac., vol. II., p. 1435, 14th ed.*). Hence, against a conviction of 23rd August the appeal tendered on 2nd September was in time.

The motion is allowed.

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MARSHALL *v.* GUNARATNE UNNANSE *et al.*

1895. *July 22 and August 9.*

Municipal Court, Colombo, 2,062.

Ordinance No. 16 of 1865, s. 90—Beating of drums at night without a license—Public nuisance by religious body.

A religious body is not entitled to commit a public nuisance by the beating of drums and tolling of bells, and no license under section 90 of Ordinance No. 16 of 1865 will be a protection against proceedings under the Penal Code, though it may be a protection against proceedings under the Ordinance.

Holland v. Kapugama Terunnánse (P. C. Mátara, No. 80,576, 1 S. C. C. 90) and *Jansz v. Endoris (P. C. Galle, No. 1,582, 9 S. C C. 204)* commented upon.

THIS was a prosecution under section 90 of Ordinance No. 16 of 1865 against the chief monk and the principal trustee of the Buddhist Viháré at Hunupitiya, who were charged with beating drums or tom-toms, and otherwise creating a noise in the night, whereby the repose of the inhabitants in the neighbourhood was disturbed, without a license.

The Police Magistrate acquitted the second accused (trustee) and found the first accused guilty "of having tom-toms beaten "without a license," and sentenced him to pay a fine of Rs. 10, or in default to undergo simple imprisonment for one week.

He appealed.

Pereira appeared for him at the argument in appeal, on July 22, 1895.

Cur. adv. vult.

9th August, 1895. BONSER, C.J.—

The appellant was charged under the 90th section of the Police Ordinance, 1865, "that he did on the 6th and 12th days of June, "1895, in the pansala at Hunupitiya, beat tom-tom between 6 "and 12 P.M. without a license from the Police Magistrate or the "Superintendent of Police of the district."

This section is drawn in such a way as to be almost unintelligible, and has consequently given rise to some diversity of judicial opinion (see *1 S. C. C. 90* and *9 S. C. C. 204*). In the former case PHEAR, C.J., held that the words "except under "military regulation, or unless they shall have obtained a license "from the Police Magistrate or from the Superintendent of Police, "who are hereby authorized to grant the same, when it shall to

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1895. *July 22 and August 9.*

"them appear expedient," referred only to the clause, "or who "shall at any time discharge firearms, crackers, or fireworks." But the Full Court in the latter case held that the words referred also to the previous clause, "who shall .... beat drums or "tom-toms, or have, or use any other music calculated to frighten "horses, or who shall make any noise in the night so as to "disturb the repose of the inhabitants."

This construction leads to the curious result that a Police Magistrate is authorized to license persons to make a noise in the night so as to disturb the repose of the inhabitants, but I am bound by it.

It was proved that the appellant is the clergyman in residence at the clergy-house or pansala of a Buddhist temple; that during the month of June there were some special services held at the temple, which lasted for above a fortnight, and that to stimulate devotion a great noise was made by beating of tom-toms and tolling of bells, which went on almost without intermission day and night, to the great annoyance of the neighbourhood.

There was no evidence that the appellant had anything to do with the management of the special services, or was present at them.

The Police Magistrate convicted the appellant of "having "tom-tom beaten without a license."

It will be seen that the appellant was charged with one offence and convicted of another, but if the evidence would support the conviction and the appellant was not prejudiced by the irregularity, it could be set right by amendment.

PHEAR, C.J., in the case above referred to, doubted whether any but the actual beater of the tom-tom could be convicted under this section. But whether this be so or not, there is no evidence in this case to support the conviction.

At the same time, the idea must not be entertained that a noise, which is an annoyance to the neighbourhood, is protected if it is made in the course of a religious ceremony.

No religious body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance, and no license under section 90 of "The Police Ordinance, 1865," will be a protection against proceedings under the Penal Code, though it may protect them from proceedings under the Police Ordinance.

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In the Matter of the Application of JOHN FERGUSON for a Writ of Prohibition against the District Judge of Colombo. 1874. Oct. 16 and Nov. 3.

District Courts—Power of, to punish for contempt not committed ex facie*—Appearance of accused—Plea to jurisdiction after application for time to adduce evidence—Ordinance No. 11 of 1868, s. 78—Power of Supreme Court to issue writ of prohibition—Contempts cognizable by Superior and Inferior Courts of Record.*

When a party appears before a District Court on a rule *nisi* issued on him to show cause why he should not be attached for contempt, and asks for time to adduce evidence, he is not precluded from subsequently pleading to the jurisdiction of the Court.

A writ of prohibition is a remedy *ex debito justitiæ*, and lies before or after sentence, and it is not necessary that a party applying for it should, as in applications for injunctions, show that he would be otherwise without remedy.

If a party have two remedies given him by law, the existence of one will not prevent his taking advantage of the other, particularly if the latter remedy is likely to be more prompt and certain than the former. And so, a writ of prohibition on a District Judge may issue in cases in which an appeal lies upon his orders.

A District Court is a Court of Record, and has power to punish summarily contempts committed in the face of the Court, such as insult to the Judge, interruption of the proceedings of the Court, disobedience to its lawful orders or process, obstruction to its officers in the execution of its process or orders, &c.

District Courts cannot be viewed as representing in this Colony the Superior Courts of Law and Equity in England, and they have not the powers vested in these Courts as to summary attachment for contempts in respect of acts done out of Court.

The Supreme Court of Ceylon has all the powers for punishing for contempt, wherever committed in this Island, possessed by the Superior Courts of Westminster.

Semble, there is no distinct recognition in Roman-Dutch law authorities of the right of a Judge to deal summarily with contempts not committed in the face of the Court, nor committed by way of obstruction to its orders, or with reference to any suit or proceeding pending in the Court.

THE facts of this matter are fully stated in the judgment of the Supreme Court.

Ferdinands, with *Alwis*, appeared for the applicant.

Samuel Grenier, for Mr. Thomas Berwick, the District Judge of Colombo.

Cur. adv. vult.

3rd November, 1874.

The following judgment of the Collective Court, consisting of MORGAN, A.C.J., STEWART and CAYLEY, J.J., was delivered by MORGAN, A.C.J. :—

This is an application for a writ of prohibition to restrain the District Judge of Colombo from further proceeding in the matter

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1874. Oct. 16 and Nov. 3.

of a certain rule *nisi* issued by him against one of the Editors of the *Observer* newspaper, calling upon him to show cause why he should not be attached for the publication of an alleged false and defamatory libel on the administration of justice and the conduct of judicial business in the District Court of Colombo, contained in the form of a letter entitled "The Same," and signed "A B C," in the issue of the newspaper of Friday, the 25th September.

This Court, having heard counsel in support of the application on the 6th ultimo, considered that cause had been shown for a rule *nisi* being granted, and ordered the same to issue with a stay of proceedings in the District Court until the application for the writ of prohibition could be disposed of in this Court. The rule came on for hearing on the 16th ultimo, when both parties were ably represented, and this Court derived valuable assistance from the arguments advanced and the authorities quoted by the counsel respectively.

Certain preliminary objections were taken to the prohibition applied for, on the grounds (1) that the applicant having appeared before the District Court, and having failed to take at the outset a plea to the jurisdiction, but having, on the contrary, asked for time to adduce evidence, was debarred from afterwards taking such objection; (2) that prohibition only lies after sentence; (3) that the applicant has failed to show, as it was necessary for him to do, that the refusal of the writ would leave him without remedy; and (4) that prohibition was not the proper remedy, inasmuch as a full right of appeal is given to parties aggrieved by the order of a District Court.

The parties are not agreed as to whether the applicant applied for time to call evidence only, or to show cause generally, adducing evidence if necessary. But this is not material, for in appeals from the decision of Police Courts, where, as in applications like the present, there are no written pleadings, this Court commonly allows objections to the jurisdiction to be made, although not taken in the first instance. It may be observed, moreover, that the course adopted by the District Court in the present case was a novel one, and the proceedings being of a summary nature, the applicant might reasonably be unprepared, in the first instance, to take all the objections to which they were fairly open.

The case is not one of a criminal information or of a civil suit in a District Court, where the defendant, who is required to enter into a formal plea, is bound to plead to the jurisdiction, if he intends to rely on that defence; and consequently it is not such a case as is provided for by the 78th section of Ordinance No. 11 of

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1868. It is also to be observed that the present objection is not one of jurisdiction simply. It relates not merely to the competency of the District Judge to take judicial cognizance of a certain act, but to the mode of procedure to be adopted. Indeed, it goes to the whole root of the case.

1874. *Oct. 16 and Nov. 3.*

With regard to the second and third objections, we may observe that a writ of prohibition is a remedy *ex debito justitiæ*, and lies before or after sentence (7 *Com. Digest, Prohibition, D*), and that it is not necessary that a party applying for this writ should, as in applications for injunctions, show that he would be otherwise without remedy. As to the fourth objection, it may be answered that the relief of appeal may not prove adequate, for it is left discretionary with a Court to stay the execution of a sentence pending appeal.

If a party have two remedies given him by law, the existence of the one will not prevent his taking advantage of the other, particularly if the latter remedy is likely to be more prompt and certain than the former. If, indeed, a prohibition will not issue in any case in which an appeal could lie, it is difficult to see to what cases arising in the District Courts it could ever be made applicable; for the appellate jurisdiction of the Supreme Court extends to the correction of all errors of fact or law committed by the District Courts; there is an appeal against any order, whether final or interlocutory; and yet the power of issuing writs of prohibition is given to the Supreme Court by the Charter and the Ordinance No. 11 of 1868, without any qualification.

The preliminary objections being thus disposed of, the right of the applicant to the writ applied for remains next to be considered. That right is based on the alleged want of jurisdiction in a District Court to punish contempts not committed in the face of the Court, or by way of obstruction to its lawful orders or process.

This is set out in the affidavit on which the application for prohibition is based, and, on reference to the newspaper containing the letter constituting the alleged contempt, which is filed of record, it appears to contain comments on the conduct of judicial business in the Court, having no reference, however, to any pending cause.

A Court empowered like our District Courts to fine and imprison and to keep a record of its proceedings is a Court of Record (*Hawkins' Pleas of the Crown, cap. 1, section 14*), and Courts of Record have undoubtedly the power to punish summarily contempts committed in the face of the Court. Such power is inherent in such Courts, and rests on the necessity of preserving

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1874. *Oct. 16 and Nov. 3.*

for them that decent respect, without which they cannot carry on their proceedings or maintain their just authority.

It would be difficult to give a specific enumeration of such acts of contempt, but they may be referred to generally as including any insult to the Judge while in the discharge of his duties, such as interruption of the proceedings of the Court, disobedience to its lawful orders or process, obstruction to its officers in the execution of its process or orders, and other acts of a like nature.

The question for consideration, however, in this case is more limited in its character.

It is contended by the learned counsel for the applicant that, though Courts of Record have power to punish contempts committed in the face of the Court or by way of obstruction to its lawful order or process, yet that contempts such as the act in question can fall within the cognizance of Superior Courts only; and this point was fully argued on both sides. The immediate questions for consideration, therefore, are (1) the existence of such distinction; and if this be established, (2) whether our District Courts are to be considered Superior or Inferior Courts.

As to the existence of such distinction, all the reported English cases, in which the power of summarily punishing contempts committed not in the face of the Court or by way of obstruction to its orders has been upheld are cases from the Superior Courts and the Court of Assize and *nisi prius*, of which latter the Lord Chief Baron, in delivering the judgment in *ex parte* Fernandez, observed that it was a Superior Court. "The "Court," said Mr. J. Willes, "held for that purpose" (Judge sitting at *nisi prius* for the trial of Crown causes) "is the Superior "Court itself, sitting by one of its members, with a jurisdiction "limited for a time to certain special matters, but with all the "powers of the Supreme Court as to such matters." (*1 Jur., pt. 1, p. 529; 30 L. J. Exch. 86*).

The particular question as to the right of Inferior Courts to punish contempts committed out of Court arose in the case of *ex parte* Jolliffe, which came before the Queen's Bench last year. At the hearing of a case, a County Court Judge made observations reflecting upon the conduct of an attorney. While the case was pending, the attorney published letters in a newspaper, accusing the Judge of tyranny and injustice. The Judge cited the attorney to appear before him for contempt of court. A rule for prohibiting to restrain the Judge from taking proceedings having been applied for, a discussion arose as to the power of Inferior Courts of Record to commit persons for contempt in respect of acts done out of Court (*Law Times*, November 23,

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1873). Mr. Justice Blackburn asked the counsel pointedly if he was aware of any authority as to the power of an Inferior Court of Record to take cognizance of such contempts. Sir J. Karslake could not cite any express decision precisely in point, but referred to two cases, one from the Isle of Man (*re Crawford, 3 Jur. 955*) and the other from British Guiana (*MacDermott, 5 Moore P. C. 469*), adding that they were both cases from the Supreme Court of those places.

1874.
Oct. 16 and Nov. 3.

The Supreme Court of the Isle of Man, as the Court of Chancery, is in no way subject to the jurisdiction of the Court of Chancery in England, and the powers given to the Court of British Guiana are very much the same as those possessed by the Supreme Court of this Colony. The rule in *ex parte* Jolliffe came on for argument on February 8, 1873; and on the general question (*42 L. J., Q. B. 121*) Lord Chief Justice Cockburn expressed himself as follows :—

It is very true that it is laid down by high authorities, and it is according to the reason of the thing, that every Court of Record has power to fine and imprison for contempt committed in the face of the Court, while the Court is sitting in the administration of justice. Such a power is obviously necessary for the administration of public justice, which may be interrupted or obstructed unless there is a power to summarily repress such outrages. But it is a very different thing to say that a Court shall have power to fine and imprison for contempts not committed in the face of the Court, and not amounting to an actual obstruction of the course of justice, but only to the use of contumelious language, or the publication of articles or comments reflecting on the conduct of the Judge. It is laid down in Hawkins (*Pleas of the Crown*) and other writers of authority that the power of committing for contempts committed in the face of the Court is given to Inferior Courts, but it is nowhere said that they have power so to punish contempts committed out of Court. There is an obvious distinction between Inferior Courts created by statute, and Superior Courts of Law and Equity. In these Superior Courts the power of committing for contempt is inherent in their constitution, has been coeval with their original institution, and has been always exercised. The origin can be traced to the time when all the Courts were divisions of the Great *Curia Regis*—the Supreme Court of the Sovereign—in which he personally, or by his immediate representative, sat to administer justice. The power of the Courts in this respect was therefore an emanation from the royal authority, which, when exercised personally or in the presence of the Sovereign, made a contempt of the Crown punishable summarily, and this power passed to the Superior Courts when they were created.

It is a very different thing when we come to the Inferior Courts, which have never exercised this power, or have never been recognized as possessing it, and I should be prepared to hold that it does not exist.

Can our District Courts, then, be regarded as Superior Courts in the sense in which the word was used in the decision last referred to? Superior and inferior are relative terms, and our District Courts undoubtedly have powers much larger than those appertaining to English County Courts. It does not follow, however, that they are therefore Superior Courts in the sense in

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1874. Oct. 16 and Nov. 3.

which the Superior Courts at Westminister and the High Court of Chancery are Superior Courts.

A case came on in appeal before this Court in 1861 from the District Court of Kandy, in which that Court claimed the right to issue writs of *habeas corpus*. The constitution of District Courts and their jurisdiction were considered in that case, and we cannot do better than quote from the judgment of the Collective Court delivered by Sir Edward Creasy on the point (*D. C., Kandy, 6,625*, in re *Shaw*, *Rámanáthan's Rep., 1860–62, p. 116*) :—

When we consider the general nature and character of the District Courts in this Island, we find that (as their name imports) they have jurisdiction not over the whole Island, but each over a limited area. Within these limits each District Court has jurisdiction over all civil pleas, suits, and actions, over idiots and lunatics, over administrations and revenue causes, and over matrimonial causes.

There is a criminal jurisdiction also, but that jurisdiction does not extend to offences of a grave character, which the provisos in the Charter and in the subsequent Ordinances in that respect define. An appeal from any proceedings of the District Court lies to the Supreme Court, which also may issue writs of *mandamus*, *procedendo*, and prohibition to the District Courts. The jurisdiction of the Supreme Court is general over the Island, and it has expressly given to it an original jurisdiction in respect of all crimes and offences wheresoever in the Island they are alleged to have been committed. The Charter gives it expressly the power to issue writs of *habeas corpus* ; and a subsequent Ordinance gives that power to any Judge of the Supreme Court, at all times and in any part of the Island.

After thus generally setting out the jurisdiction of the District Court, the learned Judge proceeded to consider whether those Courts had the right to issue writs of *habeas corpus*. "We are "quite clear," he proceeded to say, "that the District Courts have "it not. Were we to decide as desired by the respondent, we "should decide that a Court of *limited criminal authority* can "issue process in the course of which it must deal with committals "for offences expressly set out of and above its jurisdiction ; and "that an Inferior Court might by such process try the validity of "committals by this, its Superior, Court. We should be giving this "right to a mere local Court that can only act and enforce its orders "within its own limited area. Above all, we should be forgetful of "all sound constitutional principles if we were to uphold the present "proceeding. Once more let us remember (and Lord Mansfield's "judgment in *King v. Crowle, 2 Burrows*, may remind us) what in "the eye of the law a proceeding by writ of *habeas corpus* is. The "Sovereign is supposed to be acting and inquiring why one of her "subjects is deprived of his liberty. Here then we have an order "of the District Court of Kandy before us by which the Sovereign "is supposed to be acting and using one of her highest prerogatives "in an Inferior and local Court, liable at any time to be

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"controlled by *mandamus*, *procedendo*, or prohibition from this, its "Superior, Court, and subject in all matters to the appellate "jurisdiction of this, the Supreme Court of this part of Her "Majesty's dominions."

1874.
Oct. 16 and Nov. 3.

Here we may refer to a passage in *3 Blackstone* in support of the views above quoted as to a partial and limited local jurisdiction being incompatible with the attributes inseparable from a Superior Court:—"These are the several species of Common Law Courts, "which, though dispersed universally throughout the realm, are "nevertheless of partial jurisdiction, and confined to particular "districts, yet communicating with, and, as it were, members of "the Superior Courts of a more extended and general nature, which "are calculated for the administration of redress, not in any one "lordship, hundred, or county only, but throughout the whole "kingdom at large."

Mr. Justice Byles, in his judgment in the case of *ex parte* Fernandez, in pointing out several of the reasons why Courts of Assize must be considered Superior Courts, refers, among other matters, to the fact that the appeal, not as to error in fact, but on matters of law, did not exist by the common law, to their unlimited powers as Courts for the trial of criminal offences; to their power of deciding on the lives of the Queen's subjects without appeal; and to the high qualifications of the persons who constitute the Commission of Assize.

Now District Courts cannot be regarded as Superior Courts in this sense. It is true that they are Courts invested with very important functions, and with an unlimited original civil jurisdiction within their own districts; but their jurisdiction is territorially very limited in all cases, and in criminal matters is confined to the trial and punishment of the lighter classes of offences. Unlike the Supreme Court and the Superior Courts at Westminster, a District Court has no control or superintendence over any other tribunal whatsoever. An appeal lies to the Supreme Court for the correction of all errors of fact or law committed by a District Court, and from all judgments and orders of such Court whether final or interlocutory. The Supreme Court, or any Judge thereof, has full power and authority to inspect and examine the records of District Courts; and to transfer any cause or prosecution from one District Court to another whenever there is reason to conclude that the ends of justice will gain by such transfer. These District Courts are numerous (there being at present nineteen), and it is competent for the Governor by mere Proclamation to increase or diminish their number. The Supreme Court can by *mandamus* further enforce the due exercise by

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1874. Oct. 16 and Nov. 3.

District Judges of their judicial and ministerial powers; can by *certiorari* compel the production of their records, to the end that a party may have more sure and speedy justice; can by *procedendo* prevent those Courts delaying parties by not giving judgment when they ought; and by prohibition can direct them to cease from prosecuting any cause or proceeding, if it appear that the cause originally was not, or, owing to some collateral matter arising therefrom, be not within their jurisdiction.

The Court was referred, under this head of the arrangement, to certain local enactments, with the view of showing that the powers of District Courts in cases of contempt were co-extensive with those belonging to the Supreme Court. But they fail to show this. The power to punish for contempts generally is not expressly given to the Supreme Court by the Charter of 1801.

The 82nd clause gave power to that Court to issue mandates in the nature of a writ of *mandamus*, *certiorari*, *procedendo*, *or error*, and "to correct or punish any contempt thereof, or wilful dis-"obedience thereunto, by fine or imprisonment." The power to punish for contempts generally—a power which, with the qualification already stated, is inherent in every Court—is not expressly given, nor is it, on the other hand, expressly taken away. The Regulation No. 2 of 1816, which purports to regulate the practice in criminal proceedings before Provincial and Sitting Magistrates' Courts, described in that enactment as "Inferior Courts," expressly provides that nothing therein contained "shall be "construed to extend to or in any wise affect the proceedings or "authority of the Supreme Court." All cases of contempt were by it to be transmitted to the Advocate Fiscal, for that officer to decide whether such accusation was fitting to be tried before the Supreme Court or referred to an inferior jurisdiction; in the latter case, the matter was to be referred to the nearest Court to that in which such contempt was committed. This Regulation was amended by the Regulation No. 15 of 1820, which authorizes the Provincial Courts and the Sitting Magistrates' Courts of Colombo "to punish by fine or imprisonment, or both, to the extent "of their general powers in that respect, all contempts committed "before them before their own view, and also upon due proof, all "contempts of their process or of the officers acting in the execution "thereof." Contempts alleged to have been committed before any Sitting Magistrate other than the Magistrate of Colombo, or before any Justice of the Peace, were to be tried before the Provincial Court of the district, unless the same should have been committed for trial before the Supreme Court. This Regulation expressly provides that nothing therein should be "construed to extend to

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"or in any wise affect the proceedings or authority of the Supreme "Court." The Charter of 1833 contained no reference to the power of the Supreme or District Courts (the two Courts which that instrument established) to dispose of cases of contempt; but it drew the distinction between the two tribunals, and gave the larger powers to the one over the other referred to in a preceding part of this judgment. The Rules and Orders of Court framed under the authority of the Charter, and promulgated with that instrument, provided for District Judges punishing by fine or imprisonment, or by both if necessary, "all contempts committed before them-"selves, and also upon due proof all contempts of their process "or of their officers acting in the execution thereof," and also directed that the form of proceeding prescribed by Regulation No. 15 of 1820 was to be adhered to. That rule was repealed by a subsequent rule of the 21st October, 1844, but the effect of such repeal was only to leave the powers of the District Court as respects contempts to be determined by reference to the general constitution of such Courts as established by the Charter. Certain cases were also quoted to show that District Courts have theretofore punished parties guilty of contempt. All those cases, however, refer to contempts committed in Court, or by way of obstruction to its lawful orders or process; such, for instance, as disobedience of process (*Marshall, p. 62*); refusing to give evidence (*ibid, pp. 63 and 129*); attempting to bribe an officer of the Court to steal a record (*D. C., Jaffna, 318, 1 Lorenz 15*); acting in defiance of a decree of the Court (*D. C., Colombo, 12,029, Morgan, p. 14*); attempting to practise frauds on or through the Courts.

1874. Oct. 16 and Nov. 3.

Brodie's case, on the other hand (*2 Lorenz, 85*), drew the distinction between Superior and Inferior Courts, and pointed out that in the former alone is vested the power of punishing contempts committed not in the face of the Court or in obstruction of its orders or process.

"A contempt thus promptly punishable" (by Courts of Record generally), said Chief Justice Rowe, "consists for the most part "in contumelious or contumacious behaviour by words or acts in the "face or in the immediate precincts of the Court." "Further, upon "the same principle, in the Superior Courts of Record is vested the "power to fine and imprison, not only for contempts committed in "the face or in the precincts of the Court, but for contempt of or "disobedience to the process and judgments of such Courts wherever "within the realm, and whenever committed, for defamatory or "libellous matter touching the Court itself, or any of its Judges, "when acting in their judicial capacity." "It is in the Judges of "the Supreme Court only, as in men whose education, experience, and

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1874. Oct. 16 and Nov. 3.

"habitual self-control exercised daily in the face of the public, "the Bar, and the Press, may be presumed to qualify them to be "safe depositories of such power, that this large discretion in com-"mitting for contempt is vested. To Inferior Courts the common "law has conceded a more restricted jurisdiction." Two other nstances (*ex parte Staples* and *ex parte Patterson*) may be cited to show instances of the Supreme Court having taken cognizance and dealt with contempts committed not in the face of the Court or in obstruction of its process. Having thus considered the general law bearing on the subject, the Charter and local enactments on the constitution and jurisdiction of the Supreme and the District Courts, and the precedents to be gathered from our records, we have come to the conslusion that the District Courts, though discharging important functions, and exercising unlimited civil jurisdiction, each within its district, cannot be viewed as representing in this Colony the Supreme Courts of Law and Equity in England; and that they have not the powers, vested in those Courts, as to summary attachment for contempts such as the one charged in this case. It is not material for the purposes of this case to consider whether or not the Supreme Court has those powers; but as the question has been submitted and argued, we have no hesitation in declaring that we are quite prepared to hold and maintain that this Court, as the Supreme judicial tribunal in and throughout this Island, vested with all the high prerogative powers conferred on it by the Crown, has all the power of punishing for contempt, wherever committed in this Island, possessed by the Superior Courts of Westminster.

It was further contended that, whatever the English law may be, the Roman-Dutch law gives District Judges the power claimed by the respondent in this case. We are not prepared to admit, without qualification, the authority of that law in matters purely of procedure, and in Courts constituted and regulated, like ours, under very different circumstances from the Courts of the United Provinces. The proceeding adopted in this instance was entirely under the English law, and in accordance with its forms, and our decision is based on the English decisions, which have always been recognized and acted upon in our Courts in matters of contempt. We fail to find, however, in the authorities quoted, and in those we have referred to, any distinct recognition of the right of a Judge to deal summarily with contempts against his authority such as the one charged in this case, *i.e.*, contempts committed not in the face of the Court nor by way of obstruction to its orders, nor with reference to any suit or proceeding pending in the Court. Voet, our leading Dutch Law

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authority, lays down the rule, as it appears to us, in accordance rather with the general rule of the English law than with the position advanced by the respondent's counsel. "The injury," says Voet (*lib. 5, tit. 1, sect. 2*), "must be committed against a Judge not only *qua judici* but also *munus implenti*." Gaill (*Obs. 39*) lays down the position that a Judge has in certain cases authority to punish summarily injuries done to himself, notwithstanding the general rule that no one can act as Judge in his own cause; but in such cases the injury must be done to the Judge *ut judici*, and must be *notoria*, and he adds it would be otherwise "*si injuria non esset evidens et* "*notoria, sed altiorem probationem adhuc requireret: quo casu ad* "*superiorem recurrendum est, ut ipse tanquam judex competens de ea cognoscat*." An insult offered to a Judge in open Court would no doubt be (in the words of Gaill) *tale notorium quod inficiari non possit*, but the same cannot be said of the contempt charged in this case; indeed, time was given to the applicant to adduce evidence, and the matter adjourned for further inquiry. It is clear from the nature of the case that it was one which required an *altior probatio* before the applicant should be punished, and should, therefore, according to the rule laid down by Gaill, have been referred to a higher tribunal. Van Leeuwen, in his *Censura Forensis* (*part II., book II., c. 14*) strongly expresses his disapproval of the practice in some tribunals of a Judge taking cognizance of a matter in which he is interested, notwithstanding that the act complained of is *evidens et notorium*. Such a practice, he says, "*neque legi neque rationi consentaneum* "*mihi videtur, quicquid pro constitutionis aut indultæ consuetu-* "*dinis colore affingere nitantur alii*." We were referred to a passage of *Christinaeus* (*vol. II., dec. 152*), where he speaks of the power of a Judge to punish wrongs done to himself; but he limits it to cases when the *injuria* is *illata judice publice et maxime dum sedet pro tribunali*. And he goes to say, "*Ideoque ad tuendam judicum* "*dignitatem coercendamque temere riorum licentiam, supremus* "*senatus nunquam ægre tulit, juridicum, illatam sibi injuriam* "*pro tribunali sedentem ex temporali judicio vindicasse*," clearly referring to contempts either public and notorious, or committed in face of the Court. Damhouder (*Praxis, Per. Crim., cap. XI.*) is still more explicit with regard to the power of a Judge to punish summarily. After laying down the rule that Judges have power to punish summarily offences committed before them in open Court, he proceeds: "*Verum enimvero si crimen perpetratum* "*fuerit præsente testeque judice extra tribunal seu locum sena-* "*torium, non pro tribunali sedente, foris uspiam, procedendum* "*fuerit judici per inquisitionem, atque processus legitimo ritu*

1874.
Oct. 16 and Nov. 3.

Digitized by Google

1874. Oct. 16 and Nov. 3.

"*instituendus. Quod scilicet ecrimen tali loco commissum, non*
"*fuerit ipsi notorium seu cognitum tanquam judici, sed veluti privato.*
"*Itaque eo casu omnis ordo judiciarius est necessarius.*"

We may here notice some of the reasons for the distinction between the powers of Superior and Inferior Courts in dealing with contempts, restricting the powers of the latter Courts to cases of actual contempt, *i.e.*, cases of direct insult to or attack on the Court itself, disobedience of its orders, or obstruction of its process; while to the former is given the right to take cognizance, not only of actual, but of constructive, contempts, such as attacks on Judges, suitors, or witnesses, tending indirectly to interfere with the course of justice.

The reason for such distinction, given by Chief Justice Rowe in the judgment in *Brodie's case*, may be inapplicable to the Judges of the Provincial towns, whose age and experience will guard them against the danger to which large and uncontrolled powers may expose them.

But we have to deal with systems, not men, and we cannot shut our eyes to the danger of confiding such a power as the one claimed in this case to young men in remote stations; a power which, as Lord Abinger has observed in the case of *Rex v. Faulkner* (*2 C. M. and R., p. 525*), is a very important one, and requires the greatest nicety in its exercise.

Indeed, a careful study of the English decisions will show that even the Judges of the Superior Courts have refrained from pursuing the course of summary attachment, and have preferred the procedure by criminal information, except in cases where the nature of the contempt called for instant action on the part of the Court; *e.g.*, if the proceedings of a Court are impeded by disturbance during its sitting, or by obstruction of its process, or disobedience of its orders. In the early case (1,742) of *Roach v. Garden* (*2 Atkyns, 469*), whilst evidence was being taken in a pending case, a libel was published calculated to deter parties from giving evidence in favour of one of the parties by exciting prejudice against him. Lord Hardwicke interfered summarily by committing the guilty parties. In *Rex v. Jollife* (*4 Term Rep., 285* and *1791*), where the defendant awaiting his trial on a criminal information, distributed handbills in the assize town vindicating his own conduct and reflecting on the prosecutors, the case was postponed, and another information granted.

In *Rex v. Fleet* (*1 B. and Ald. 379, 1818*), where a party published in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments, the proceeding taken was by information. So in the case of Sir Francis Burdett

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(*4 B. and Ald. 95* and *314, 1820*). In the case of the *Observer* newspaper (*Rex v. Clement, 4 B. and Ald. 218, 1821*) the summary proceeding was adopted because the case was one calling for immediate repression. The defendant published proceedings contrary to the express order of the Court in the course of a trial likely to continue for several successive days, there being other prisoners also charged with the same offence, whose trials were to be taken up one after the other. Summary proceeding was also pursued in *Rex v. Davidson* (*4 B. and Ald. 329, 1821*), but that was for contempt by a party in the course of addressing a jury, and for which he could not be indicted. Strong as was the case of *Rex v. Clement*, yet two of the Judges, Littledale and Gaseley, J.J., refused to act upon it. In the case of *Rex v. Gilham* (*Moodey and Malkim, 165*), a case of murder was to be tried during the assize. Whilst it was being held, an artist was exhibiting in the Town Hall of the Assize town models of the murdered woman, and of the supposed murderer, who was then to stand his trial. Application was made that he be committed for contempt, but Mr. Justice Littledale said: "I think the exhibition "highly indecorous and improper, and one that may subject the "man to punishment; but it does not appear to me or to my learned "brother to be a contempt; therefore I cannot interfere in the "mode proposed to commit the person exhibiting." And this decision has been followed by several decisions in the Court of Queen's Bench.

1874. *Oct. 16 and Nov. 3.*

In Long Wellesley's case (*2 Russ. and Myl. 69, 1831*), when the Court of Chancery punished a person for contempt for the clandestine removal of a ward from the custody of the person under whom the guardians appointed by the Court had placed the ward, and who, when examined by the Court, admitted the fact, but refused to state where the ward was, the necessity for prompt and efficacious action was fully established and acknowledged by the House of Commons, when Mr. Wellesley claimed the privilege of Parliament. In Lechmere Charlton's case (*2 Mylne and Craig, 326, 1837*) the offender was punished for contempt for writing a threatening letter, and one provocative of a duel, to the master with reference to proceedings actually going on before the master, whom he had to meet daily. His offence was also repeated by the sending of another offensive letter to the Lord Chancellor. In Vansanden's case the contempt was the distribution of papers in and out of Court, but as in *Rex. v. Gilham*, the remedy pursued was by information. In the recent cases against Messrs. Whalley, Onslow, and Skipworth, the defamatory remarks were made against witnesses who were forthcoming to prove the charge of

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1874.
Oct. 16 and Nov. 3.

perjury, which the Chief Justice had directed to be brought against the claimant, and against whom the grand jury had found a true bill. It will thus be seen that even the Judges of the Superior Courts of Westminster have only followed the remedy of summary information in cases where a necessity existed for prompt action. In other cases they have left the matter to be dealt with by ordinary course of procedure.

We consider, for the reasons given, that it was not competent to the District Judge of Colombo to take the proceedings he did in this case; and the order of the Court is that the rule for prohibition allowed on the 6th ultimo should be, and the same is hereby made absolute; and the said District Judge is hereby directed to refrain from further proceeding in the matter of the rule *nisi* issued by him against the Editor of the *Observer* newspaper, referred to in the first paragraph of this judgment.

1895.
Sept. 25.

DAWSON *v.* PERERA.

Additional P. C., Colombo, 3,866.

Appeal where accused had pleaded guilty—Plea of guilty—Criminal Procedure Code, ss. 220, 229, and 403—Judgment—Criminal Procedure Code, s. 372.

Where an accused appeared to summons, and the Police Magistrate explained to him the particulars of the offence, and then recorded as follows :—" He pleads guilty. I accept the admission " of the accused. He is fined Rs. 5 "—

Held, that this was irregular, the proper course under section 220 of the Criminal Procedure Code being to record the admission of an accused party, as nearly as possible, in the words used by him.

In the event of a conviction in the Police Court, the requirements of section 372 of the Criminal Procedure Code, as to specifying the offence of which, and the section of the law under which, the accused is convicted, must be conformed to.

THE accused was charged with continuing a kraal in the Panadurё lake, known as Panadurё Eliya, so as to impede the convenient navigation thereof, in breach of sub-section 12 of section 94 of Ordinance No. 10 of 1861. He appeared to summons, and the Police Magistrate then made the following record :—" Parti- " culars of the offence explained to the accused. He pleads guilty. " I accept the admission of the accused. He is fined Rs. 5."

The accused appealed.

Pereira, for accused appellant. The proceedings are irregular.

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[Bonser, C.J.—The accused had no right to appeal as he had pleaded guilty.] A plea of guilty cannot now be recorded in the Police Court. Section 403 of the Criminal Procedure Code, no doubt, provides that when an accused person has pleaded guilty, and been convicted by a District or Police Court on such plea, there shall be no appeal, but so far as Police Courts are concerned, the plea here referred to is the plea under section 229. That section has, however, been repealed, and has not been re-enacted by Ordinance No. 22 of 1890; so that a plea of guilty is not a plea now admissible in summary trials before Police Courts. In a case like this, the only section under which it is now open to a Police Magistrate to take steps is section 220 (Ordinance No. 22 of 1890), but under that section when an accused person admits the commission of an offence, such admission must be recorded, as nearly as possible, in the words used by him, and then the Police Magistrate might convict him. There is no provision in the Code that against such a conviction there should be no appeal. In support, then, of the appeal, it is submitted that there is no record of what the accused said when questioned under section 229, nor of any formal conviction. The accused gives in his petition of appeal the exact statement he made. If that was the statement, it is clear that it did not amount to an admission of the offence, and he could not be convicted thereon.

25th September, 1895. Bonser, C.J.—

[After setting forth the charge.] The matter came up before Mr. de Saram, the Itinerating Police Magistrate, but he did not, as he is required to do by law, examine the complainant, but issued summons forthwith. Defendant appeared, and all that is recorded is this:—

" Particulars of the offence explained to the accused. He pleads " guilty." Then the judgment: " I accept the admission of the " accused. He is fined Rs. 5."

The proceedings were irregular. Section 220, which has been substituted by Ordinance No. 22 of 1890 for the old section 229 of the Criminal Procedure Code, provides that the accused is to be asked if he has any cause to show why he should not be convicted, and that if he admits that he committed the offence of which he is accused, his admission shall be recorded, as nearly as possible, in the words used by him. The Magistrate did not record the admission as nearly as possible in the words used by the defendant, for he has merely recorded that " he pleads guilty." Now, the defendant in his petition of appeal says, that what really happened

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1895.

Bonser, C.J.

was this. He said: "I did make a kraal, but I was justified in doing it by long custom." That is not a plea of guilty, and, if he did say that, the Magistrate ought to have duly recorded the statement.

I notice a further irregularity: that the judgment does not conform to the requirements of section 372 of the Criminal Procedure Code. It does not specify the offence of which, or the section of the law under which, the accused was convicted, and, therefore, it seems to me, in view of these irregularities, that the case should go back to be re-heard.

1895.
Sept. 13.

In the Matter of the Insolvency of M. L. MARIKAR ABDUL AZIS.

D. C., Galle, 258.

Practice—Appeal—Insolvency proceedings—Security for appeal costs—Ordinance No. 7 of 1853, s. 6—Rules and Orders of 1833—Civil Procedure Code, s. 756.

The provisions of the Civil Procedure Code, 1889, relative to the giving of security for the respondent's costs of appeal, do not apply to appeals from orders in insolvency cases.

Re insolvency of Philippo (*D. C., Colombo, 1,697*), *9 S. C. C. 120*, over-ruled.

THIS was an appeal by the insolvent against the refusal of the District Judge to grant him a certificate of conformity under the Ordinance No. 7 of 1853. No security for the respondent's costs of the appeal was given.

The case came on for argument before Bonser, C.J., and Browne, A.J., on June 21, 1895, and *De Saram* appeared for the insolvent and *Dornhorst* for the respondent.

Dornhorst took the preliminary objection that no security for costs in appeal was given as required by section 756 of the Civil Procedure Code, and relied on the case reported in *9 S. C. C. 120* (In the matter of the insolvency of Philippo).

De Saram contended that the case relied on was not in accordance with section 6 of the Ordinance No. 7 of 1853, and ought to be over-ruled.

The case was set down for argument before the Full Court (Bonser, C.J., Withers, J., and Browne, A.J.) on the point as to the necessity for giving security for costs.

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De Saram (*Jayewardene* with him) on the preliminary objection contended that the provisions of section 756 of the Code dealt only with appeals from civil cases, and was never intended to touch insolvency proceedings, which had a special procedure of its own. No rule or order was ever made by the Supreme Court under section 4 of the Insolvency Ordinance, so that we must be guided by the regulations which existed at the time the Ordinance came into force. There were none; but orders in insolvency proceedings were treated as interlocutory orders, and required no security to be given. Clarence, A.C.J., in the case referred to, was wrong in dealing with the old Rules and Orders, 1833, for they did not touch insolvency appeals. If appeals from insolvency orders were dealt with under the Code, and required security, the difficulty would be to fix the class under which such security should be given.

Dornhorst, *contra*. The Civil Procedure Code dealt with appeals from any judgment, decree, or order of any original court, and it is submitted that orders in insolvency proceedings come within this section 754 of the Code. Original Court is defined in section 5 of the Code so as to include District Courts and Courts of Requests, and under section 756 security must be given for such appeals.

De Saram, in reply.

13th September, 1895. BONSER, C.J.—

This is an appeal in an interlocutory matter, and the preliminary objection is taken that the appellant has not given security for costs in appeal, and the question for our decision is—whether the objection is a good one or not. The practice before the introduction of the Civil Procedure Code appears to have been uniform, that no security was required in appeals under the Insolvency Ordinance. The right of appeal was given by section 6 of Ordinance 7 of 1853, and that section enacted that "every "such appeal shall be brought on and prosecuted in such "manner, and shall be subject to such regulations as now "exist, or shall hereafter be made by any rule or order of the "Supreme Court." Now, it is admitted that no rule or order of the Supreme Court was made after the date of the Insolvency Ordinance, either dealing with insolvency matters or any other appeals. At the date of the enactment of Ordinance 7 of 1853 there were in existence Rules and Orders which had been made in 1833 dealing with appeals generally from District Courts in respect of civil matters. The Rules and Orders therefore governed appeals in insolvency matters in the absence of any express rules

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1895.

BONSER, C.J.

made by the Supreme Court. In 1889 the Civil Procedure Code was passed. The question arises whether that Code expressly or impliedly repealed the then existing procedure in respect of appeals in insolvency matters.

There are clauses in the Civil Procedure Code which seem, at first sight, to show such an intention. Section 754 provides that "every appeal to the Supreme Court from any judgment, "decree, or order of any Original Court,......shall be made in "the manner herein provided." But if we look to the requirements of the Code as to the contents of a petition of appeal, we see that one of the requirements is that the petition shall state the names of the parties to the action. An insolvency proceeding is not generally described as an action.

It is more properly described as a matter, and from that I draw the conclusion that the provision in the Code as to appeals was only intended to refer to appeals in actions properly so designated. I am confirmed in this view by consideration of the general scope and frame of the Civil Procedure Code. It deals with appeals in civil actions; it makes no express provisions as to insolvency appeals, and, indeed, is altogether silent with respect to insolvency proceedings.

I am of opinion that it was never intended that insolvency proceedings should be touched by the Code, but that it was intended that the provisions of Ordinance 7 of 1853 should continue to regulate all proceedings under that Ordinance.

There is, however, a decision of two Judges to the contrary (*re* insolvency of Philippo, reported in *9 S. C. C. p. 120*), where it was held that the 58th chapter of the Civil Procedure Code deals with appeals generally, and that section 756 requiring security to be given applied to insolvency appeals. But the Court there does not appear to have dealt with section 6 of Ordinance No. 7 of 1853, which requires that all appeals under it should be prosecuted subject to the then existing regulations in default of any new regulations made by the Supreme Court thereafter. I confess that I cannot follow the reasoning of that judgment. Clarence, J., said there were no orders of the Supreme Court, but instead of inferring as a necessary consequence that, as there were no such orders, we must revert to the procedure under the regulations of 1833 and Ordinance 7 of 1853, he draws the conclusion that the Code must govern. I say that I cannot follow this reasoning, or agree with the decision. In my opinion the intention of the Code was to leave untouched the procedure as to appeals in insolvency cases. The objection to the reception of this appeal cannot be sustained, and the appeal must be heard.

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WITHERS, J.—

I agree.

I venture to dissent from the learned Judges whose judgment is under review, for the simple reason that, in my opinion, the Civil Procedure Code has nothing whatever to do with insolvency matters.

The preamble of this Code recites that it is expedient to consolidate and amend the laws relating to the procedure of civil courts in the Colony. In section 5 of this Code " civil court " is defined to be " a court in which civil actions may be brought." Under chapter II. of this Code an action may be either regular or summary, the Code itself providing for all cases in which actions may be taken by way of summary procedure. " Insolvency " is not mentioned in the Code. " Action " is not an apt term to describe insolvency proceedings, the procedure in regard to which is regulated by Ordinance No. 7 of 1853.

The 6th section of that Ordinance enacts that " all decisions and " orders of the District Courts made under the authority of this " Ordinance shall be subject to an appeal to the Supreme Court, " and every such appeal shall be brought on and prosecuted in " such manner, and shall be subject to such regulations as now " exist, or shall be hereafter made by any rule or order of the " Supreme Court."

No rules especially adapted to appeals from orders in insolvency matters having been framed by the Supreme Court, we are carried back to the practice of appeals from judgments in civil courts obtaining at the date of that enactment. And here we are met with a difficulty. In the case of interlocutory orders only was no security required. In all other cases an appellant, if able, was obliged to furnish security for the subject of litigation as well as security for costs. If unable to furnish the former, he was allowed to furnish security for costs only, if he had a good cause of appeal.

However, as a matter of continuous practice from the date of the Insolvency Ordinance to the date of the judgment under review, orders in insolvency proceedings have been treated as interlocutory orders in civil courts.

They have always come up before a single Judge, without security for costs. That long-settled practice, whatever the reason for it, must be taken to be the law on the point, unless expressly or impliedly repealed. The Civil Procedure Code has not, I consider, repealed it.

The reason for the practice may have been that in insolvency proceedings there is no subject of litigation as in a contested

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1895.

BROWNE, A.J.

action, and as all the property of the insolvent has vested in the assignee, he cannot be expected to furnish security for costs.

BROWNE, A.P.J.—I concur.

[On the merits the appeal was heard on the 17th September, 1895, and the case was sent back for further inquiry as to the financial position of the insolvent.]

1895.
Sept. 17.

TERUNNANSE *v.* MENIKE.

D. C., Badulla, 746.

Civil Procedure Code, s. 247—Action by execution-creditor—His incompetency to prove prescription—Title of execution-debtor—Ordinance No. 22 of 1871, s. 3—Meaning of "possession" therein—Roman-Dutch Law as to prescription.

It is not competent for an execution-creditor, who in an action under section 247 of the Civil Procedure Code was seeking to have it declared that certain immovable property, which had been released by order of Court from seizure under a writ of execution of a judgment held by him, was available for levy as his judgment-debtor's property, to lay a foundation of title in his debtor to the property sought to be so levied, by proving ten years' adverse and uninterrupted possession by his debtor of the property, immediately previous to the seizure in execution, in accordance with the requirements of the Ordinance No. 22 of 1871.

The "possession" contemplated in section 3 of Ordinance No. 22 of 1871 is that of a party to a suit, or of his predecessor in title, but not that of a third party.

The effect of the Ordinances 22 of 1871 and 8 of 1834 is to sweep away all the Roman-Dutch Law relating to the acquisition of immovable property by prescription, except as regards the property of the Crown.

THE facts of the case are stated in the judgment of their Lordships.

Bawa and *Van Langenberg*, for appellant.

Sampayo, for respondent.

17th September, 1895. BONSER, C.J.—

In this case the plaintiff brought an action under section 247 of the Civil Procedure Code claiming, (1) to have an order made by the District Court on a claim inquiry set aside; (2) that one Johannis Fernando might be declared the owner of a certain field, and that such field might be liable to be seized and sold under a writ of execution issued by the plaintiff against the said Fernando; (3) that the defendants might be ejected from the field and the

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plaintiff put into quiet possession thereof; and (4) Rs. 50 damages. For the third claim there was obviously no foundation.

It appears by the evidence that the plaintiff purchased " one amunam" of this field on the 26th of June, 1871, when it was sold by the Grain Tax Commissioners for default by the then owner, the husband (now deceased) of the first defendant, in payment of the tax.

No conveyance, however, was ever made to the plaintiff, nor a certificate of sale under Ordinance No. 5 of 1866 given to him, so that the plaintiff did not obtain a legal title to the land.

It further appears that by a deed of the 16th July, 1890, the plaintiff conveyed the land to the said Johannis Fernando for a sum of Rs. 150, which was not paid, but for which the said Johannis Fernando the same day mortgaged the land to the plaintiff. The plaintiff alleges the Johannis Fernando went into possession, but never paid the purchase money or any part thereof.

The defendants, who are the widow and daughter of the late owner of the land, seem to have been continuously asserting their right to this land ever since his death.

It is a significant fact that they were admittedly in possession of and cultivating this land on one occasion after the purchase by the plaintiff for a whole year. The plaintiff explains this by saying that they went in as his tenants. Considering that these people had been all along asserting a right to this land, this explanation is in the highest degree improbable, and I am by no means satisfied that the plaintiff has ever had possession of this land for such a period or of such a character as satisfies the requirements of Ordinance No. 22 of 1871.

But, assuming that the plaintiff has shown that he had possession of this land for ten years uninterruptedly before his sale to Fernando, I do not think that this can avail him in the present action.

What he has to prove in this case is that the land is Fernando's, but apart from Ordinance No. 22 of 1871, Fernando had no title. Can the plaintiff set up prescription to prove Fernando's title ? In my opinion he cannot.

It was held in the case of *Punchirala v. Andris Appuhami* (*3 S. C. R. 149*) that it is not competent for a plaintiff or defendant to set up a third person's title under section 3 of Ordinance 22 of 1871, but that the possession to be proved must be that of a party to the suit or of his predecessor in title, and that the judgment to be given under that section must be declaratory of the right of a party to the action, not of a stranger. I agree with that decision.

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The Ordinance was passed, as I venture to think, to protect actual possessors only, and was intended to be used as a shield only, and not as a weapon of offence.

If the person in possession were sued by the true owner, he could plead the Ordinance, or he might take the initiative if his possession was disturbed or threatened, and apply for a decree establishing his title and quieting him in possession. The Ordinance differs essentially from the English Statute of Limitations, which at the expiration of the statutory period transfers the ownership to the possessor, and extinguishes the title of the original owner.

The plaintiff's action therefore fails, and should be dismissed with costs.

Withers, J.—

The only point discussed before us was whether an execution-creditor, who in an action under the 247th section of the Civil Procedure Code was seeking to have it declared that certain immovable property, which had been released by order of Court from seizure under a writ of execution of a judgment held by him, was available for levy, as his judgment-debtor's property could lay a foundation of title in his debtor to the property sought to be so levied, by proving ten years' adverse and uninterrupted possession by his debtor of the property immediately previous to the seizure in execution, in accordance with the requirements of Ordinance No. 22 of 1871.

It has been laid down and constantly acted upon by this Court that the governing Ordinance No. 22 of 1871, and the previous Ordinance No. 8 of 1834, kept alive the repeal by regulation No. 13 of 1822 of "all laws heretofore enacted or customs existing with "respect to the acquiring of rights and the barring of civil "actions by prescription," and that the consequence of that regulation and those Ordinances was to sweep away all the Roman-Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown.

Hence the only law relating to the acquisition of private immovable property by prescription is to be found in the 3rd section of the Ordinance No. 22 of 1871.

That section determines the mode of acquisition of a prescriptive title.

It has been held over and over again by this Court that a decree of title to such immovable property can be granted under the circumstances set forth in that section.

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The immovable property, however, it is clear, must be the subject of litigation between contesting parties, a plaintiff and a defendant.

If a plaintiff solicits the decree provided for by that section, he must prove that he has had adverse and uninterrupted possession of the immovable property for ten years previous to the bringing of the action; and if a defendant solicits such a decree, he must prove that he has had a similar possession of the immovable property.

The judgment-debtor not being either a party plaintiff or a party defendant to the present action, it is clear that the execution-creditor cannot put forward proof of the statutory possession in his judgment-debtor for the purpose of supporting his present claim.

This very point was determined in the case of *Punchirala v. Andris Appuhamy* reported in *3 S. C. R. 149*, and we were invited to re-consider that decision.

In my opinion that was a good decision, and so far as this point is concerned I would give judgment against the plaintiff.

BROWNE, A.J.—

In this action the case for the plaintiff is that he on the 26th June, 1871, purchased one amunam of a field at a sale held under the provisions of the Ordinance No. 5 of 1866; that he held possession thereof till the 16th July, 1890, when he sold it to Johannis Fernando for Rs. 150 to be paid in three instalments, and his purchaser gave him on the same date a mortgage bond to secure such payment; that on the 19th January, 1893, plaintiff put this bond in suit in the action No. 532, and on the 14th March, 1893, obtained *ex parte* a *decree nisi*, which was made absolute on the 9th May; that in the interval between these last two dates, viz., in April, 1893, defendants entered into and took possession of the field, and thereafter, when in July plaintiff issued writ of execution and seized the field, defendants laid claim thereto, which claim was upheld on the 19th September; and that plaintiff thereafter, under the provisions of section 247, Civil Procedure Code, instituted this action on the 27th September, and in the 8th paragraph of his plaint specially averred that the defendants have entered into and held possession for five months before the institution of his action.

Now plaintiff admits he did not get from the Government Agent the certificate which section 9 of Ordinance No. 5 of 1866 made sufficient to vest the property in him, nor a transfer of the land. The title of his execution-debtor thereto—the seizable interest

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1895.

BROWNE, A.J.

therein [which by a mistake in paragraph 4 of the plaint, that finds repetition throughout the proceedings, is termed a seizable interest of the plaintiff instead of belonging to the plaintiff's execution-debtor]—can therefore be one resting only on the quiet and undisturbed possession of plaintiff and his vendee by adverse title for over ten years previous to the institution of any action which puts in question the sufficiency of fact of such an alleged statutable possession. The learned Acting District Judge has held that such possession has been satisfactorily established. I think it is open to question whether it has been so, for though I believe the fact of the original auction sale, and though the defendant thereafter, on some date not given by her deed No. 4,965, gave as the northern boundary of her other two amunams this one and described it as the property of the plaintiff, it is in evidence that there have at different times, the dates of which are not clearly given, been disputes actually culminating in Gaṇsabáwa litigation respecting plaintiff's rights to the rents and revenues of the field. We have not the records of those litigations before us to say how far they disputed plaintiff's title to the land, or only raised some question as to fact or amount of rent or share due to him ; and it is for plaintiff under section 3 of Ordinance No. 22 of 1871 (assuming at present he has right here to do so) to give full proof that his possession was undisturbed and uninterrupted ; and next it must be observed that from plaintiff's evidence that he would not have put his mortgage bond in suit had not defendants taken possession of the land, and the fact that he paid no tax for 1893, it can only be concluded they had so taken possession prior to the 19th January, 1893, when he instituted his suit No. 535, and hence that the defendants had been in possession for at least eight months before he instituted this suit. Now, assuming as before that plaintiff would have right to sue to establish his mortgagor's title by prescriptive possession, and that under the decisions in *Rámanáthan, 1860–1879*, and *II. C. L. R. P. 45*, he would, despite the decision in *8 S. C. C. 31*, not be debarred by his waiting for those eight months from bringing his action, yet it is clear he could in January, 1893, have instituted either a separate *actio hypothecaria* against the defendant as those then in possession of the mortgage, or else have joined them as co-defendants in his action against her mortgagee instead of waiting for the improbability that on his issuing writ they would not dispute his right to make the mortgage exigible.

Then arises the question which I have hitherto assumed in plaintiff's favour—whether under section 3 of Ordinance No. 22 of 1871, and his right thereby to bring his action "for the purpose

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1895.

BROWNE, A.J.

" of being quieted in *his* possession of lands......, or to establish " her claim in any other manner to such land," he can sue here to have established his mortgagor's title thereto by prescriptive possession of the mortgagor and his predecessors in title, which in this instance " includes plaintiff himself." The question must be asked as of any writ holder who had to sue under section 247, Civil Procedure Code, and after hearing the further argument addressed to us I consider such writ holder has no such right. The words are limited to *his* claim and *primâ facie* relating to his own personal claim in and for his own personal rights have no words added thereto, which would give them this larger effect of establishing a claim for another, although in its other parts the section is so suggestive of and helpful to establish a claim *through* another. It was urged on us this would baffle many a creditor and help many a slippery debtor by debarring the former from contesting in a section 247 action a false claim preferred so plausibly as to be upheld by the Court, but it will be remembered that a creditor can by an examination of a debtor under section 219, before issue of writ, ascertain what prescriptive rights he has, so as to forestall any collusive claim, and that success in such an expedient may only result in an arrest and insolvency of the debtor.

But all these considerations indicate to me that plaintiff's entire procedure has been erroneous, and that under the objections taken in the answer and pressed at the trial the plaintiff is not entitled to sustain this action against the defendants.

He should have instituted the hypothecary action against defendant in the first instance as part of, or concurrent with, his action against his mortgagor; and if he elected to proceed with the latter alone under the circumstances that (as he both alleges and admits) his mortgagor's residence was unknown to him, he should have followed the procedure specially directed for such a contingency by section 645 *et seq.* of the Civil Procedure Code, for section 648 makes special provisions for such a contingency as has here occurred, simplifying procedure and securing litigation more prompt and less costly than that which has been here adopted of action against mortgagor, claim, and this *quasi* hypothecary action under section 647.

Not having conformed to the sequestration procedure against the absent mortgagor, I cannot regard the plaintiff to have established as against these defendants that he ever obtained any mortgaged decree. Moreover, the formal decree both fixes as the date for payment one anterior to the date of decree absolute, viz., a date between those of *decree nisi* and *decree absolute*, but

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1895.

BROWNE, A.J.

also does not at all conform to the requirements of section 201. It does not show *ex facie* that the property decreed to be sold was mortgaged by the defendant to the plaintiff by his bond dated 16th July, 1890, and it gives no directions whatever for sale. It never empowered the Fiscal to seize the lands. The authority to him to be valid should have been given in the decree itself, and not in any writ or subsequent order. If it can be held that the decree obtained in his abortive or irregular mortgage action is good for aught as a money decree, and we could regard this as an ordinary case of a section 247 action by creditor against claimant, I can only say that I regard the proof of ten years' uninterrupted and undisturbed title as insufficient, and hold plaintiff is not entitled to succeed herein. But I am not disposed to allow the result of an action to be good for a purpose other than that to which it was originally directed. It would be plainly unjust to the defendants that we should do so, and thereby give plaintiff a general writ against all his property in the first instance instead of allowing to the debtor the shield of the value of the mortgage so far as it should prove effectual.

I would dismiss plaintiff's action with costs.

1895. *Sept. 27.*

BUDDHARAKITA TERUNNANSE *v.* GUNASEKARA.

D. C., Colombo, letter B.

Joint lessors—action for rent by one lessor for his share of rent—subsequent action by joint lessors—Spliting of cause of action—Civil Procedure Code, s. 34—cancellation of Lease—rights of joint creditors.

A and B being joint lessors, A sued the lessee for his half share of the rent on the lease for a certain period, making B a party defendant to the action, and requiring them to show cause, if any, why judgment for half the rent should not go in favour of A. A recovered judgment. Subsequently both A and B sued the lessee for the other half share of the rent for the above period, and for the whole of the rent for a subsequent period, and for a cancellation of the lease.

Held, that this action was maintainable, and that it was not barred by section 34 of the Civil Procedure Code.

Held further, that in the case of joint lessors, each can sue the lessee separately for his moiety of the rent.

Held further, that when a lease contains the stipulation that, in default of payment of rent by the lessee, the lessor should be at liberty to sue the lessee for a cancellation of the lease, the lessor is under no liability to seek a cancellation at the default, but that he may sue for and recover the rent at each of several defaults and sue for a cancellation of the lease at any subsequent default.

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Per Withers, J.—When creditors have joined in stipulating for the payment of a sum of money, each is entitled to his quota of that sum. When several debtors join in promissing to pay a sum of money, each is liable to pay a quota of that sum of money, and no more. This happens even when a plurality of debtors or creditors intervene by the death of a single creditor or debtor leaving several heirs-at-law.

THIS was an appeal from an order of the Court below rejecting a plaint on the ground stated at length in the judgment of his Lordship the Chief Justice.

Pereira, for plaintiff appellant. The District Judge has held that the present action is barred by section 34 of the Civil Procedure Code. That section enacts that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and it applies to the case of a single plaintiff suing for a part only of his claim in respect of one cause of action, and then suing for the remainder in a separate action. In the present case, however, there was no splitting of the cause of action. The first plaintiff could only have sued for a moiety, in the first action, of the rent for the period involved in that action, and now both the plaintiffs sue for the other moiety for that same period and for the whole of the rent for a subsequent period. Our law allows a joint creditor to sue the debtor for his share only of the debt. He cited *Van Leeuwen, bk. V., chapter 3, section 11, p. 524, of translation of 1820 ; Pothier on Obligations, vol. I., p. 144 (Evans's translation) ; Van der Linden, book I., p. 203 (Henry's translation)*.

Cur. adv. vult.

27th September, 1895. Bonser, C.J.—

This is an appeal from an order rejecting a plaint by Mr. Templer, Acting District Judge of Colombo. The learned District Judge has not followed the procedure laid down by section 48 of the Civil Procedure Code, for he has not specified the date when the plaint was presented and rejected, or the name of the person by whom it was presented, and whether such person was plaintiff or proctor as required by that section.

The action was an action by two joint lessors of certain immovable property against the lessee, and it claimed on the part of one of the plaintiffs the half share of the rent for a certain period of time, and on behalf of both plaintiffs the whole rent for another later period, and the cancellation of the lease for a breach of covenant. The plaint was rejected on the ground that one of the plaintiffs had sued and obtained judgment for a moiety of the rent in respect of the period first mentioned.

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The learned Acting District Judge said that that concluded the other plaintiff from suing for his share; that the first plaintiff had no right to sue for a moiety of rent; but that having done so, section 34 of the Civil Procedure Code barred the claim of his co-lessor for rent, and also the claim of both to have the lease cancelled. The Acting District Judge held that the lessors were jointly entitled to the rents, and therfore that both parties must join in suing for it.

If the law of England were in force here that would have been a correct decision, but the law of this Colony appears to be otherwise. The Roman-Dutch lawyers do not seem to have favoured joint obligations. They considered obligations as several, unless there were express words showing that the obligation was *in solidum*, or it so appeared from the nature of the case.

With regard to joint leases, I find it laid down by *Voet, book XIX., tit. 2, section 21*, "*Locati actio est personalis bonae fidei,* "*quæ locatori datur, ... si plures locaverint, singulis pro sua* "*parte; contra conductorem, et, si plures sint, contra singulos pro* "*rata; nisi aliud nominatim pacto actum sit, aut appareat, locatorem* "*singulorum personas in solidum respexisse et ita duos pluresve* "*in solidum fecisse reos locationis.*"

That seems sufficient to dispose of the objection to this plaint, and shows that the plaintiff was justified in suing alone for his own share of the rent. The other objection, that an action cannot be maintained for the cancellation of the lease, because an action had been brought for rent, is an objection which I cannot understand.

A lessor who has been driven to sue for his rent is quite at liberty after having borne with the lessee's default for a time to sue for a cancellation of the lease, and thus get rid of an undersirable tenant.

Withers, J.—

I think the District Judge has quite misconceived the provisions of section 34 of the Ordinance when he applied them to this case. As to the question of law, I understand the Roman-Dutch Law to be as follows:—

The payment of a sum of money is a divisible operation, and when creditors have joined in stipulating for it, each is entitled to his quota of that sum of money. When several debtors join in promising to pay a sum of money, each is liable to pay a quota of that money and no more. A plurality of debtors or creditors may have existed at the time that the stipulation or promise was made, or may supervene by the death of a single creditor or debtor leaving

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several heirs-at-law. It makes no difference. It is only when the intention of the contracting parties is clearly expressed that a divisible obligation shall be treated as an indivisible one, that one of several creditors cannot sue for a quota, and one of several debtors cannot discharge his obligation by paying a quota.

The passage from *Voet* cited by the Chief Justice disposes of this case. To fortify my statement of the general law I will add a passage from the *Digest* (*Corpus Juris Civilis*), *lib. XLV.*, *tit. 2*, *fr. 11*, *sections 1 and 2. De doubus reis constituendis.*

Section 1.—*Cum tabulis esset comprehensum, illum et illum centum aureos stipulatos, neque adjectum, ita ut duo rei stipulandi essent, virilem partem singuli stipulati videbantur.*

Section 2.—*Et e contrario cum ita cautum inveniretur, tot aureos recte dari stipulatus est Julius Carpus ; spopondimus ego Antonius Achilleus, et Cornelius Dius : partes viriles deberi : quia non fuerat adjectum singulos in solidum spopondisse, ita ut duo rei promittendi fierent.*

This is an ordinary contract of lease by two lessors stipulating for the payment of a certain sum by way of rent, and it comes under the ordinary law of stipulation by more than one creditor.

QUEEN *v.* AMARIS APPOO.

D. C., Colombo (Criminal), 1,167.

1895.
October 23.

Evidence—Admissibility of a confession—Burden of proof—Inducement.

A statement amounting to a confession is inadmissible in evidence against an accused, unless it be proved affirmatively by the prosecution that the statement was not made under the influence of an improper inducement.

The mere fact that the statement was not made in answer to questions does not exclude the possibility of its having been made as the result of a threat or an exhortation to confess.

THE facts of the case are stated in the judgment of his Lordship the Chief Justice.

Dornhorst, for appellant.

Dias, *C.C.*, for respondent.

23rd October, 1895. BONSER, C.J.—

This is a curious case. The appellant was tindal of a padda boat, and he and the prosecutor live somewhere near Chilaw. The appellant has been in the habit for a good many years past of

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1895.

Bonser, C.J.

bringing copperah down from the Chilaw District to Colombo for sale. In August last he brought a boat load of copperah to Colombo. The copperah belonged to a number of persons.

He took the copperah to Messrs. Freüdenberg's mills, accompanied by the owners, and there sold it to Messrs. Freüdenberg. They gave him a cheque for the whole amount, some Rs. 2,000. He went to the bank and got it cashed. Then the whole party went back to the boat, which was moored in the river at Grandpass, and dined and slept there on board the boat. In the morning, when they were to have settled all accounts and each person to have received his share, the appellant getting his commission, the appellant took from his waist the key of the box in which the money had been deposited the night before, unlocked it, and the box was found empty.

There seems to have been some little commotion and excitement about the loss of the money, and some one—it does not appear who—gave information about it at the Grandpass police station, whereupon the sergeant in charge sent a police officer to the boat to make inquiry. The police officer arrested the appellant and another man—a boatman—and took them to the Grandpass police station after searching the boat ineffectually for the missing money. There the owners of the copperah laid a charge against these two men of criminal misappropriation of the money. The appellant was then taken to the Kotahéna police station, and was searched by a police constable in the presence of a sergeant. A sum of Rs. 160 was found tied in a handkerchief round his thigh.

The accused were brought up the next day before the Magistrate on a report from the police, in which the names of the witnesses are given, which includes the police officer who searched the boat and the police officer who searched the appellant at the Kotahéna station. Evidence was taken by the Magistrate on the 22nd and 23rd August, and on the 23rd, on the conclusion of the hearing, the case was adjourned to the 27th, and the prosecutor's proctor put in a further list of witnesses, and that list included the name of the police sergeant at the Kotahéna station who was present when the appellant was searched. He was called on the 27th, and gave some very important evidence.

He stated that about 10 or 15 minutes after the money had been found on the appellant, and after the appellant had been locked up, the appellant told him that he had sent a sum of Rs. 1,000 to his village by one Podi Sinno, and that he had spent Rs. 90. He further deposed that the appellant did not make the statement in answer to any question put by him, but he does not explain how and under what circumstances, the appellant came to make this statement.

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This witness gave evidence at the trial before the District Judge, and that evidence gives quite a different colour to this alleged confession. After stating the circumstances of the dicovery of the money on the person of the appellant, he proceeded thus:— "On this being discovered the accused voluntarily stated that he "had sent a £100—no, Rs. 1,000—to his country by one Podi Sinno "and that he had spent Rs. 90." Now that conveys the impression that the appellant was so overcome by a sense of guilty at the discovery of this money concealed on his person that he at once made a clean breast of the whole matter. Of course that is not an improbable story in itself, but it is quite a different account of the matter from the account given to the Police Magistrate, and there is no doubt that the account given to the Police Magistrate is the true one, for the police constable says that about 10 or 15 minutes after the man had been locked up he called up the sergeant and had some conversation with him, but that he did not hear what was said. The police sergeant, I should remark, stated that this constable was present at the time the alleged confession was made. Of course, if that confession was really made and was admissible in evidence, the District Judge was quite right in finding the appellant guilty. But I feel serious doubt as to whether this alleged confession was properly admissible in evidence. It has been laid down by the English Judges that the onus is on the prosecution to show affirmatively that the statement was not made under the influence of an improper inducement. Now we are not told in this case how the man came to make the statement. All that the police sergeant states is that it was not made in answer to any question put by him. That does not exclude the possibility of its having been made as the result of a threat or an exhortation to confess.

That being so, I think that this confession was not admissible. Apart from that confession, what evidence is there against the appellant?

There is the suspicious circumstance that the large sum of Rs. 160 is found concealed on his person. There is the statement made by the prosecutor Waas that when he woke up in the morning at 6 o'clock the appellant was not found in the boat. But no other witness speaks of his absence from the boat, and this witness does not say when he returned—and it might be that the appellant had a good explanation to give of his absence. It might have been a momentary absence to obey a call of nature, or it might have been an absence of some hours. As to that we are left in complete ignorance. On the other hand, there is in the man's favour the fact that he had been employed by these people in carrying on

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1895.

BONSER, C.J.

their business of bringing down their copperah and selling it for the owners and accounting for the proceeds for many years, and that he had never before been found in default. It appears that some ten persons slept in the boat on the night in question; and the fact that the key was found in the appellant's possession, and that he produced it and opened the box seems to me to a certain extent to tell in his favour. Had he stolen the money himself, one might have expected that he would have dropped the key overboard and protested that somebody had stolen his key and thus got at the money.

It appears to me that apart from the alleged confession, there is really nothing tangible in the evidence to bring home guilt to the appellant; and the fact that this confession was not produced till a late stage of the case renders me somewhat suspicious of its truth. Taking, therefore, the case as a whole, I think there is grave doubt as to the guilt of the appellant, and that effect should be given to that doubt by acquitting and discharging him.

WITHERS, J.—

I agree, and have nothing to add.

1895.
November 5.

PIERIS *v.* MAGRIDA FERNANDO *et al.*

P. C., Colombo, 38,081.

Ordinance No. 5 of 1889—Keeping a brothel—Evidence.

In a prosecution under Ordinance No. 5 of 1889, for keeping a brothel, it was proved that a number of women occupied the place alleged to be a brothel, and that men of all sorts visited it both during the day and by night, and that spirits were drunk on the premises, and that there were fights among the people resorting thereto; but there was no evidence of any act of indecency or fornication.

Held, that the place was not a brothel within the meaning of Ordinance No. 5 of 1889.

A brothel is a place to which persons of both sexes have recourse for the purpose of prostitution.

THE first accused was charged with keeping a brothel, and the second accused with knowingly permitting certain premises, of which he was lessee, to be used as a brothel. They were convicted and sentenced to pay a fine of Rs. 200 each.

They appealed.

Dornhorst, for the first accused, and *Jayawardena*, for the sec[illegible] accused.

Drieberg, for the Crown.

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5th November, 1895. Withers, J.— 1895. Withers, J.

I am unable to support the judgment of the Magistrate. He has convicted the first accused in this case of keeping a brothel, and the second accused as a tenant for permitting the premises to be used as a brothel.

In the case of *Singleton v. Ellison*, reported this year, 1895, in *L. R., vol. I., Q. B., p. 607*, it is said that the word brothel has a well-known legal acceptation. It applies to a place to which persons of both sexes have recourse for the purpose of prostitution. Not a single act of indecency or fornication is spoken to by any of the witnesses as having occurred in this house, which is said to be used as a brothel.

A number of women occupy it and men of all sorts visited it both by day and by night. Spirits appear to be drunk on the premises, and fights are said to take place there, and the neighbours naturally regard the place as one to be put down.

It must be a great nuisance to decent people, but the charge does not relate in any way to the offence of keeping a brothel. There is no evidence that it is a brothel. The conviction of the accused must therefore be set aside, and the accused acquitted and discharged.

1895. *September 24.*

PERUMAL *v.* TERUNNANSE.

D. C., Colombo, 6,667.

Reduction of amount of claim—Fall of suit from a higher class to a lower class of stamp duty—Right of party to use stamps appropriate to the lower class.

Where a plaintiff, by reducing his claim by amendment of plaint, reduces the class of the case, the stamp duty payable on proceedings after such amendment is as on an action in the lower class.

THE facts material to this case appear in the judgment of the Supreme Court.

Dornhorst, for appellant.

Bawa, for respondent.

24th September, 1895. Bonser, C.J.—

This is an appeal by the plaintiff against an order of Mr. Templer, Acting District Judge of Colombo, rejecting his amended plaint. The case illustrates the procedure of the District Court of Colombo.

The action was by the assignee of a lease against the lessee, claiming Rs. 200 as rent, and also damages Rs. 1,000 for breach of

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1895.

BONSER, C.J.

certain covenants in the lease as to the management of the land. The case therefore was one for Rs. 1,000 damages and Rs. 200 for rent due; but in order to bring the case within class IV. of the Stamp Ordinance, the plaintiff waived Rs. 200 of his claim, making his claim Rs. 1,000, which is the maximum amount of class IV.

On the 26th of March the case came on for trial, and the plaintiff then wished to amend his plaint by abandoning his claim for damages, and making his claim to one for rent only, and he also wished to make some merely verbal alterations to correct some mistakes which were pointed out by the defendant's counsel. Why these amendments were not made then and there, and why the only issue left as to the rent was not tried and determined at once, I cannot conceive.

But that course was not adopted. The Acting District Judge allowed the plaintiff time to amend his plaint, but ordered him to pay all costs consequent on the amendment, while the costs of the day were ordered to abide the final result of the action.

Then, instead of a day being fixed for the trial, the case was ordered to be taken off the roll. That was an order which ought not to have been made. Then, on the 30th of April, a motion was made on behalf of the plaintiff to allow the amendment which had already been allowed.

That motion the Acting District Judge dealt with thus: he ordered the matter to be listed for argument as to the sufficiency of the plaint as amended, on the ground that the plaint had undergone a complete transformation by being restricted to a claim for rent only. Why it should have been listed for argument I cannot understand. Then, when it came on for argument before Mr. Templer as to the sufficiency of the amendment, he did not hold it insufficient, but he rejected it altogether, on the ground that the original plaint was one for Rs. 1,000, whilst the new plaint was one for Rs. 200 only, and he appears to have assented to the argument of Mr. Bawa, that the defendant would be seriously embarrassed by having a lesser liability to answer. He seems to have also thought that the defendant would have to pay for stamps on all his processes as in an action for Rs. 1,000, and would not be allowed to use stamps as in an action for Rs. 200. In this I think he was completely wrong. I asked counsel whether there was any provision in the Stamp Ordinance which makes it necessary for parties sued for the recovery of Rs. 200 to use stamps as in an action for Rs. 1,000, and, as I expected, no such provision was forthcoming. We were told that this was the practice of the District Court. If so, the practice is clearly wrong, and the sooner it is altered the better.

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The case should now be tried on the only issue left, that is, the question of defendant's liability to pay this sum of Rs. 200 for rent. I cannot make the District Judge pay the costs of all these useless proceedings. But no costs will be allowed of any of the proceedings subsequent to the 26th of March, 1895, the day when the amendment was allowed either between party and party, or between proctor and client, except the costs of this appeal, which the respondents will pay.

WITHERS, J.—

I quite concur. The simple issue to be tried is, whether the defendant is liable to pay a sum of Rs. 200 by way of rent under a contract of lease which has been assigned to the plaintiff. The plaintiff originally sued not only for rent, but also for damages in breach of one or more covenants in the lease. An answer was put in and the case was fixed for trial. On the day of trial the defendant's counsel took exception to certain passages in the plaint. The pleader, on having the weak places pointed out to him, asked the Court for leave to amend, which was granted.

The amendment proposed was to introduce some apt words which had been omitted from the part of his claim, which the plaintiff desired to maintain, and to strike out his cause of action and prayer for damages. Why this could not have been done then and there and the trial of the simple issue proceeded with I am at a loss to imagine. However, it was not done, and Mr. Templer, who took up the case as judge, would not allow it to be done for reasons which I am unable to appreciate. Why a party who, having instituted an action in a higher class, reduces it legitimately to a lower class before the trial takes place, should be obliged to continue to pay the duty of the original class, I fail to understand.

No costs will be allowed except costs of the appeal.

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1895.
November 5.

JAYAWARDANA *v.* DON THOMAS *et el.*

P. C., Tangalla, 9,456.

Criminal Procedure Code, s. 2)7—Misjoinder of accused—Unlawful gaming—Keeping a common gaming-house—Evidence—Ordinance No. 17 of 1889.

It is a misjoinder to try a person charged with the offence of keeping a common gaming-house along with one charged with unlawful gaming.

The essence of the offence of unlawful gaming under Ordinance No. 17 of 1889 is the publicity which attracts idlers of all sorts to various forms of public nuisance. It is therefore incumbent on the prosecution, on a charge of unlawful gaming, to prove that the house in which the gaming was carried on was a common gaming-place.

If a man choose to allow the public access to his house, with or without payment, to play with cards for money, he uses it as a common gaming-house. But any number of a man's friends or acquaintances may play in his house every day with cards for money without an offence being committed against the Ordinance.

ON appeal against a conviction under the Ordinance No. 17 of 1889—

Dornhorst, for appellants, contended that the proceedings were irregular. Unlawful gaming and keeping a common gaming-house being two distinct offences, the 14th accused who was charged with keeping a common gaming-house should not have been put upon his trial together with the other accused who were charged with unlawful gaming. This court had held so in 23,756, P. C., Matara (11th July, 1895). And there was no evidence of unlawful gaming.

Drieberg, heard contra.

5th November, 1895. WITHERS, J.—

The fourteenth accused in this case has been convicted of keeping a common gaming-house, and the other accused of unlawful gaming.

The fourteenth accused should have been tried separately from the others in accordance with section 207, Criminal Procedure Code. The offence of keeping a gaming-house is quite distinct from the offence of unlawful gaming.

In any case I should quash the conviction against the fourteenth accused. But having heard the whole case laid before me by counsel, I come to the conclusion that the conviction cannot be sustained against any of the appellants.

As I have often said before, the policy of the Gaming Ordinance is to prevent people from betting or playing games for a stake in a public place, and to prevent them from turning private houses into public gaming-places. The real essence of the offence is the

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publicity which attracts idlers of all sorts to various forms of public nuisance. Before any of these appellants could be convicted, it was incumbent on the prosecution to prove that the house in which the accused were evidently playing with cards for money is a common gaming-place.

The house, in this case, is the private dwelling house of the fourteenth accused, and if a man chooses to allow the public access to his house, with or without payment, to play with cards for money, he uses it as a common gaming-house.

Any number of a man's friends or acquaintances may play in his house every day with cards for money, without an offence being committed against the Ordinance.

I have no doubt the Magistrate is right in his finding that several people were playing with cards for money on the night in question, including the fourteenth accused and the second accused. That does not of itself constitute unlawful gaming. It is for the prosecution to prove that on the night in question anybody might have come to the house and join in the game played, whether he paid for the privilege or not. Accordingly, the prosecution is bound to prove that the house was open to the public on that night; of this there is really no evidence to my mind. Accordingly, I must set aside the conviction and acquit and discharge all the accused.

GOONEWARDANA *v.* RAJAPAKSE *et al.*

1895.
October 8.

D. C., Colombo, letter C.

Right of lessee to the action rei vindicatio *or to a possessory action as against lessor—Civil Procedure—Motion for summons—Motion to forward case in appeal.*

A notarial lease is a *pro tanto* alienation, and gives the lessee during his term the legal remedies of an owner and possessor.

When a plaint is accepted by the court, there is no necessity for a separate motion for summons, nor is a motion to forward the case in appeal necessary after the filing of the petition of appeal.

THE facts of the case are sufficiently stated in the judgment of the Supreme Court.

Sampayo, for appellant.

8th October, 1895. BONSER, C.J.—

This is an action by a lessee of immovable property against his two co-lessors, and another, who, he complains, have wrongfully ousted him. It appears from the plaint that the lease was made

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1895.

BONSER, C.J.

by a notarial instrument duly registered; that the plaintiff paid in advance the rent for the whole term of five years and entered into the occupation of the property, and that having been in such occupation for more than a year, he was unlawfully ejected by the lessor and the other defendant, who has a lease of the same property from the lessors subsequent in date to the plaintiff's lease. He claims restoration to possession and damages.

The Acting District Judge of Colombo, Mr. Templer, rejected the plaint, on the ground that "the statement in the plaint is "barred by a positive rule of law, that a tenant cannot sue his "landlord in ejectment; and that his remedy is for a breach of "covenant for quiet enjoyment," in other words, that his only remedy is an action for damages. It is not stated where this positive rule of law is to be found, and I do not believe that any such exists.

It appears that, according to the Roman Law, where a land or house was let, the "conductor," who in the case of land was termed *colonus*, and in the case of a house *inquilinus*, was not regarded as possessing the demised premises, for he did not claim to hold them *ut dominus*, which was of the essence of possession, so that the lessor was still the possessor, notwithstanding the letting.

If, therefore, the tenant were ejected by a third person, he was not entitled to the action *rei vindicatio*, nor to the ordinary possessory interdicts. But by the Roman-Dutch Law, where a lease was for a substantial period, the tenant had the right to sue his lessor to compel him to give up the use of the premises during the term, and was not restricted to an action for damages for breach of contract. *Neque dubitandum videtur, quin, locatione in decennium, vicennium, longiusve tempus contracta, locator ac heredes ejus personali actione conducti compellendi sint ad usum conductori relinquendum intergro longo aut longissimo tempore in contractu definito* (*Voet, XIX., 2, section 1*).

Further, such lessees were, by Roman-Dutch Law, allowed to assert their right to the use of the land during the term, even against the purchaser, to whom their landlord had sold the property after granting the lease, although by the Roman Law the purchaser was not bound by the lease, provided, however, that the leases were by deed (*Voet, XIX., sections 1 and 2*).

The Legislature of this Island has still further recognized the rights of lessees. Ordinance No. 7 of 1840 makes every lease of immovable property (other than a lease at will or for a period not exceeding one month) void, unless made by a notarial instrument. Ordinance No. 8 of 1863 makes it compulsory to register all

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such leases, and punishes non-registration with loss of priority. Both Ordinances placed leases in the same class as conveyances and other alienations, and it is now impossible to treat a lessee under a notarial instrument, however short be the term, as a Roman *colonus* or *inquilinus*.

In my opinion we ought to regard a notarial lease as a *pro tanto* alienation, and we ought to give the lessee, under such a lease, during his term, the legal remedies of an owner and possessor (see *D. C., Colombo, 55,552, Vanderstraaten, p. 283 ;* and *Perera v. Sobana, 6, S. C. C. 61,* where the distinction between a modern lease and a Roman *colonus* or *inquilinus* is recognized).

For these reasons I am of opinion that the plaint discloses a good cause of action.

I wish to add that the record shows that, even at this early stage of the action, at least two unnecessary motions have been made. At page 11 there is a motion paper containing a motion by the plaintiff's proctor, that summons should issue to the defendants. This is unnecessary, for section 55 of the Civil Procedure Code makes it the duty of the Court to issue summons if it accepts the plaint. Again, at page 12½ there is another motion paper containing a motion, that the petition of appeal be forwarded to the Supreme Court, but it was the duty of the District Court to forward it without any special motion for that purpose. These motions serve no object. They only mean expense to the parties, and encumber the record with unnecessary matter. The costs of these motions should not be allowed in taxation either between party and party, or between proctor and client.

Withers, J.—

I readily subscribe to My Lord's judgment. Lessees for terms of years under instruments duly executed and signed should have their tenure assured to them as if they had the *civilis possessio* of the civil law.

The possessory action should be open to them against whosoever ejects them by force, be he stranger or landlord, or one claiming under the landlord. Such leases may be regarded as sales for the term of the *jus possidendi,* which the nature of the contract requires.

Motions for the issue of summonses on the presentment of a plaint are mere waste of time and paper, and even the Code does not say they are necessary.

The Code enacts that motions are to be made only in matters incidental to an action in the course of it, and not when step is being taken in the regular procedure (see *section 91*).

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1895.

WITHERS, J.

The issue of a summons is a step in the regular procedure which the Court has to take.

There was again no occasion to move that the petition of appeal should be forwarded without security. It was an *ex parte* order not requiring security.

The costs of these motions should not be allowed in taxation.

1895.
October 23.

SINNATANGAM *v.* SINNEN.

P. C., Jaffna, 15,535.

Contempt of Court—Disobedience of order of Court—Admission made in a former proceeding—Conviction upon such admission—Alterations in the record.

In order to find a person guilty of contempt for disobeying an order of Court, it is necessary that such order should have been duly drawn up by the Court.

An accused, who had admitted the truth of the charges brought against him, having been once discharged, on his undertaking to do certain things, it is not competent for a Magistrate, upon finding that the accused had failed to fulfil his undertaking, to convict him upon his previous admission.

If a Magistrate make any alteration or addition in any proceeding, he should note in the margin the date of such alteration or addition and initial it.

UPON a petition presented by the defendant praying for a revision of the order of the Police Court made on the 21st of September, 1895, the Supreme Court delivered the following judgments :—

23rd October, 1895. WITHERS, J.—

The matter of these revision proceedings is briefly as follows : On the 6th August, 1895, one Sinnatangam presented a complaint to the Police Magistrate of Jaffna, in which she charged the petitioner in revision and his daughter with various offences, viz., criminal trespass, voluntarily causing hurt, and theft from the person.

On the day fixed for the inquiry, viz., the 17th August, the parties appeared before the Magistrate, and on it being represented by complainant's counsel that the parties were disputing about a piece of land alleged to belong to the complainant, which the defendants would not quit, this journal entry was made :—

" The complainant undertakes to pay Rs. 2 to enable accused to " put up a house for themselves. The accused undertake to quit

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"the house within three weeks from this date, that is, before the "7th of next month. So ordered.

"The complainant withdraws the case. Accused discharged.

"G. W. Woodhouse,
"Police Magistrate."

The next step occurred on the 21st September, on which this entry appears :—

"The accused, (1) Sinnan and (2) Vainar Saravanai, are called "upon to show cause why they should not be fined for the admission "made on August 17, and for not obeying the order of this "Court. Vainar Saravanai states: 'I was deceived. The com-"plainant has nothing to do with the land. I will not quit the "land. Ariacutti and I own this land in common.'"

And the following judgment was delivered :—

"The accused admitted the charge on the 17th August and "undertook to quit the land, and the Court directed them to do so.

"The second accused now calmly comes into Court and says "that he will not abide by the order of Court.

"This is a case of contempt of Court, which aggravates the "offence, and I adjudge second accused guilty on his own state-"ment of the charge made against him by complainant under "section 314 of the Ceylon Penal Code, and sentence him to pay "a fine of Rs. 25, or in default to undergo one month's rigorous "imprisonment.

"The first accused is second accused's daughter. She is dis-"charged with a warning.

"G. W. Woodhouse,
"Police Magistrate."

This not being an appealable judgment, the party condemned petitioned to have it brought up in revision and quashed, and I directed that, upon due notice to the parties and the Police Magistrate, the judgment should be brought up in revision.

It is clear that the judgment cannot be sustained. No order of the Court was drawn up which the petitioner could have obeyed or disobeyed, and hence he would not be guilty of contempt for refusing to abide by an order which did not exist.

If the petitioner was punished for one or more of the offences before referred to, on his own admission, that was clearly wrong because the Magistrate had discharged the man, and was *functus officio qua* those proceedings.

I may be wrong, but it appears as if some passages marked in blue pencil in the entries of the 17th August and 21st September had been written in since my perusal of the record, which I called for after reading the petition in revision. Unless

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1895.

BONSER, C.J.

my memory fails me, the petitioner was adjudged guilty for contempt of the Court's order and for that only, and I should like to know if I am mistaken. But on neither ground, of "admission" or contempt of Court, can the judgment be sustained, as the Magistrate, in his letter to this Court, has shown no cause why his judgment should not be disturbed.

The judgment and proceedings had upon the complaint in case No. 15,535 of the Police Court of Jaffna of the 6th August should, in my opinion, be quashed.

BONSER, C.J.—

I agree that the proceedings should be quashed as altogether irregular. The Police Magistrate no doubt acted with the best of intentions, and desired to do what he could to bring the dispute between the parties to a speedy and satisfactory conclusion. But in so doing he has acted *ultra vires*. The law may be defective, as he points out, but the Magistrate is not a legislator, and he must give effect to the law as it stands: he must make the best of it. He has convicted a man of an offence on a charge from which he had been previously discharged on the 17th of August last, and he has convicted him on what, he says, is an admission made by him on that day. But there is no record of any such admission. Even if there had been, that admission made in a previous proceeding, from which the accused had been discharged, would not avail to support a subsequent conviction.

There is another matter which should be mentioned. My brother Withers, before whom this record came first, and who ordered it to be sent for the observations of the Magistrate, is of opinion that it is not in the same state as it was then. Certainly there are interpolations in the record in different coloured ink. The Magistrate should be called upon for an explanation as to whether he did make any alterations in the record, for if he did that, his act was quite irregular. If he did make any alteration, he should have a note in the margin initialled by him to show when the alteration or addition was made.

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OSSEN *v.* SIADORIS.

1895. *November 8.*

P. C., Hatton, 18,210.

Possession of false weights—Intention to use fraudulently—Testing of balance—Ceylon Penal Code, s. 259—Ordinance No. 11 of 1887.

It is not an offence under section 259 of the Penal Code as amended by Ordinance No. 11 of 1887 to possess a false weight unless such possession be with the intention to use it fraudulently.

And the mere possession of a weight which does not conform to the standard, and even the use of it, is not presumptive evidence of an intention to use it fraudulently.

A balance used for testing a weight which is alleged to be a false one should itself be tested before it is applied as a test.

THE accused was charged under section 259 of the Penal Code as amended by Ordinance No. 11 of 1887 with "having been "in possession of a false weight intending that the same may be "fraudulently used," and was convicted and sentenced to pay a fine of Rs. 25.

The accused appealed.

Jayewardene, for appellant: These is no evidence that the weights are false. There is nothing to show in what balance they were weighed. The difference may be due to some defect in the scales. Even assuming that the weights are false, there is nothing to show that the accused intended to use them fraudulently. It is essential that a fraudulent intention should be proved, as will appear from the express provision to that effect made by Ordinance No. 11 of 1887. The conduct of the accuseds clearly shows that they were not aware of the weights being false, and that they had no fraudulent intention.

8th November, 1895. WITHERS, J.—

The appellant has been convicted of the offence of being in possession of a false weight, to wit, a 1-lb. weight, intending that the same may be fraudulently used, against the provisions of section 259 of the Penal Code as amended by Ordinance No. 11 of 1887; and the question is whether his guilt has been proved.

The facts are briefly these. The appellant is a boutique-keeper. On the 7th of September last the appellant and other boutique-keepers were required by a sergeant of police to bring their weights and measures to the store of one Periyannen Chetty to be tested. Accused's boutique is opposite this Chetty's boutique, where the sergeant of police was seated when he gave orders to

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1895.

WITHERS, J.

the boutique-keepers to bring their weights and measures. The measures not being presently in question, I confine myself to the weights.

The accused brought out of his boutique a 1-lb. weight, a ½-lb. weight, a ¼-lb. weight, and smaller weights. He declared those were all he had, and it is not suggested that he had any more. The result was that the sergeant complained to the Magistrate of the accused having in his possession two false weights, viz., a 1-lb. weight and a ½-lb. weight (and a false measure).

The sergeant says that he tested the weights in some boutique-keeper's balance against standard weights, and that he found them both short. He does not condescend to say by how much either of appellant's weights fall short of the standard 1-lb. and ½-lb. weights, nor does he say whether, or how, he satisfied himself that the boutique-keeper's balance was a true one. This balance was not produced in Court. There was a balance in Court, with regard to which the Magistrate notes that the scales were perfectly fair. I assume it to be a true balance. A balance may, however, appear to be just without being so at all, and it should be tested before it is applied as a test itself.

In another note the Magistrate observes that the ½-lb. weight, tried in the balance in Court against a standard ½ lb., proved to be considerably heavier; while of the 1-lb. weight he observes "it is evidently short." In another note again he writes: "The "pleader for accused here points out to the Court that the false 1-lb. weight is shorter by half an ounce."

The Magistrate has not expressly found that accused's 1-lb weight falls short of the standard 1 lb. by any particular quantity. As to the ½-lb. weight the Magistrate left that out in his formal charge. Why? It was as much a false weight as the other, if the balance used in Court is to be trusted; and if he intended to use it fraudulently, it was an offence on the part of accused to have it in his possession.

If he uses it knowingly in purchasing goods, it could only be with a dishonest intent. If he uses it knowingly for selling his goods, he is a superlatively honest man, but a foolish tradesman. If these weights are respectively much below and above the standard weights, it is almost incredible to suppose that the accused knows of their disparity, for much that he gains by the 1 lb. he would lose by the ½ lb. This makes one very sceptical about the accuracy of the balance used in Court. But if the weight is under the standard, and therefore false, what is the evidence of intention to use it fraudulently? This weight bears the impression of "1 lb." on it. Did the accused know it to be

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otherwise, or had he reason to suspect it? He at once brought it with his other weights to be tested. He said they were correct. Had he reason to believe they were not? Except these two the others seem to be correct. 1895. WITHERS, J.

The mere possession of a weight not conforming to the standard, and even using it, does not necessarily imply a fraudulent intent.

I am not satisfied in the first place that this 1-lb. weight is a false one, and of intent to use it fraudulently I can find no evidence.

I therefore set aside the conviction, and acquit the accused.

1895. *October 8.*

SILVA *v.* RAMEN CHETTY.

D. C., Kandy, 8,343 (Criminal).

Defamation—Words per se *contumelious—Presumption of evil intent—Rebutting evidence as to absence of* animus et affectus injuriandi.

Defendant having presented a petition to the Secretary of the Municipal Council of Kandy, containing the statement that certain persons, "including the plaintiff, are selling opium and bhang "secretly with the intention of making money fraudulently against "the Government"—

Held, that the above words were *per se* contumelious, and their publication should be presumed to have been made with a contumacious intent, in the absence of proof that the defendant wrote the words complained of *sine injuriandi animo et affectu.*

THIS was an appeal by the defendant from the judgment of the District Court of Kandy which condemned him in damages for defaming plaintiff in a petition addressed to the Secretary of the Municipal Council of Kandy, wherein occurred the following words: "the following persons [meaning plaintiff and certain "others] are selling opium and bhang secretly with the intention "of making money fraudulently against the Government." The defendant denied the defamation complained of, and pleaded that the petition in question was a privileged communication in respect of a matter which it was to the interest of the Municipal Council to know, and which he believed to be true. The District Judge held these pleas insufficient, and gave judgment for plaintiff.

Dornhorst appeared for defendant appellant.

Van Langenberg, for plaintiff respondent.

Cur. adv. vult.

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1895. October 8. — WITHERS, J.

8th October, 1895. WITHERS, J.—

It cannot be argued that the words used in the petition addressed by the defendant to the Secretary of the Municipal Council, Kandy, and informing him "that the following persons "are selling opium and bhang secretly with the intention of "making money fraudulently against the Government" are not contumelious in themselves. Then what follows, according to Voet? *Sin tales fuerint prolati sermones, qui per se et propria significatione contumeliam inferunt, injuriandi animus adfuisse creditur, eique, qui illa (sic) protulit, probatio incumbit injuriæ faciend› consilium defuisse (Voet, XLVII. 10, 20).* It was for the defendant then to satisfy the Court that his motive and intention (the *affectus et animus injuriandi* of Van Leeuwen) were innocent.

It may be that an occasion had arisen in which the petitioner could have honestly represented to the Council that he had received information, which he had reason to believe, of illicit sale of opium going on in the plaintiff's premises. And even had this fact not been true, he might possibly have repelled the presumption of *animus injuriandi* by disclosing a state of circumstances, including his own prudence of conduct and honesty of purpose, from which the Court might have properly inferred that, though the language was contumelious, it was not written with *injuriandi animo et affectu.*

It was clearly incumbent on the defendant in this case to dispel the presumption of a contumacious intention which his language created, because the plaintiff, not content to prove the publication of the libel, went into the box and deposed on oath that he had not sold any opium in his shop after his own license had expired.

The decree must be affirmed with costs.

BROWNE, A.P.J.—

To the claim of the plaintiff for defamation contained in the petition by the defendant, the latter answered with (1) denial of the defamation and (2) with a plea that the said petition was a privileged communication addressed to the Secretary of the Municipal Council of Kandy in reference to a complaint, the truth of which he believed.

I agree with the learned District Judge that this plea was wholly insufficient as a plea of privileged occasion. It was needful that the defendant should have set out in detail plainly and concisely the matters of fact and law which would have

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established that his communication was made *bonâ fide* and not maliciously, and on an occasion which gave the privilege. The plea of the conclusion at which the Court should, after such detail, be asked to arrive is one on which no issues could be raised and so was bad.

But somehow or other the issue of this conclusion was framed, to be pending between the parties, and when the Court below has refused to rule it in defendant's favour, this Court in appeal is asked to do so. Has the defendant, to sustain it, shown either the necessary absolute *bonâ fide* or protective occasion ? In the lower Court is offered no proof of either. In his appeal petition he submits he should be protected when he appealed for redress or protection to the legal machinery which created for him a certain right, or to a functionary who has partial control thereof. I think the simple answer thereto—the defect in the plea—is that he has not shown his appeal could *per se* avail him aright. There was no coercive power in the Municipal Council to restrain his rival and protect him. That could be ensured only by application to the proper tribunal, and his appeal to any power save to it savours not of *bonâ fides* or proper occasion, but rather of an attempt to affect, and that not for his benefit, *i.e.*, to injure his supposed rival through the hands and at the risk not of himself, but of the presumably disinterested Municipal Council or court sergeant.

The devise is very transparent, especially when no attempt is made to prove either requisite of the plea, and it to my mind deserves as little protection as the truth itself afforded to the deliberate *famosus libellus*, for the reason that the writer *infamare malicio quam accusare* (*Voet, XLVII. 10, 10*). I agree that the decree should be affirmed with costs.

In view of Sergeant Simanpulle's evidence, it seems very possible to me that, had the learned District Judge held that the act of the defendant in regard to the second and third causes of action—whatever were their appropriate names—of "trespass," "malicious prosecution"—were truly of the description *quicquid alterius infamandi gratia* (*ibid, section 8*), I would have agreed in affirming such decision also.

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1895.
Oct. 4 and
Nov. 15.

NICHOLAS DE SILVA *v.* SHAIK ALI.

D. C., Colombo, C 5,684.

Christian marriage—Non-registration—Ordinance No. 6 of 1847—Rei vindicatio—*Alienation by wife of property in community without knowledge of husband—Estoppel—Claim by heir to property invalidly sold to third party—Right of such party to plead the* exceptio rei venditæ et traditæ—Jus retentionis—*Rules as to* impensæ utiles.

The 4th section of the Ordinance No. 6 of 1847 came into operation when Her Majesty's confirmation of the Ordinance was notified in the *Government Gazette* of 8th December, 1849.

A marriage solemnized by a minister of the Christian religion under the provisions of that section does not become null and void for want of registration.

A wife, who lives apart from her husband by mutual consent, cannot validly alienate property belonging to the marriage community.

Semble, per BONSER, C.J.—If the husband knew of the sale by his wife and raised no objection to its completion, he would be estopped from denying its validity.

Per BONSER, C.J., and WITHERS, J. (*dissentiente* BROWNE, A.J.).—A claiming as heir of B a moiety of a property which B in her lifetime had sold and delivered, without the knowledge of her husband, to C for value, may be successfully opposed by C pleading the *exceptio rei venditæ et traditæ*.

Where a possessor, who has made improvements on a land believing it to be his own, sells it with the improvements thereon to another, he must be taken to have sold with the land the right to such improvements, and with them the right to defend possession of them by every available means, among which is the *jus retentionis* till the *impensæ utiles* are refunded.

The *jus retinendi* passes in the sale from one *bonâ fide* possessor to the other without a special cession.

The money which a *bonâ fide* possessor pays in discharge of a mortgage, which encumbered the property when it came into his hands, is *utilis impensa*.

The rules as to the extent to which the *impensæ utiles* can be recovered from the owner are :—

(1) When the outlay has exceeded the permanent advantage to the property, the owner is only liable to the extent to which the property has really been rendered more valuable by them.

(2) And not even to that amount if the outlay has been very much greater than the owner would himself have made ; in which case, it is left for the judge to determine on a consideration of all the circumstances and persons how much should be recovered.

(3) If at the time of the suit the improved value of the property caused by the expenditure exceeds the amount so laid out, still only the sum actually expended can be recovered from the owner.

(4) When a claim is made for compensation, an account has to be taken of the mesne profits received ; and only so much of the expenditure, whether made on the production of the fruits or on the property itself, as exceeds the amount of these profits or *fructus* can be allowed, subject, however, to the preceding rules.

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(5) And in taking this account, fruits which have been consumed as well as those which are still extant must be set off against the clause for expenditure. The fruits of the expenditure itself however—*fructus ex ipsa melioratione percepti*—are to be excluded from the accounting and not to be set off against the claim.

1895.
Oct. 4 and Nov. 15.

PLAINTIFF alleged that one Rodrigo, being the owner of a certain allotment of land with the buildings thereon, died intestate in October, 1888, leaving him surviving an only daughter, Johanna; that Johanna married Don Juan Harmanis Appu and continued in possession of the said property from 1888 till she died intestate in November, 1891; that her husband, being entitled to an undivided half of the property, sold his moiety to plaintiff in January, 1894; that plaintiff was appointed administrator of Johanna's estate in April, 1894; and that defendant held unlawful possession of the property since January, 1894, and refused to deliver it to plaintiff. He prayed, for himself and as administrator of Johanna's estate, for a declaration of title to the whole of the said property and for ejectment and damages.

The defendant, admitting that Rodrigo was the original owner and Johanna was his daughter, denied the other allegations of the plaintiff, and pleaded that Rodrigo mortgaged the property to one Silva Mudaliyár in January, 1888; that after the death of both Rodrigo and Silva Mudaliyár, Johanna, who was the wife of one Carolis Silva (and not Harmanis Appu as alleged by plaintiff), sold it to Celestina Hamine in December, 1888, and out of the proceeds of the sale paid the amount of the mortgage to the administrator of Silva Mudaliyár; that Celestina Hamine sold the property to one Ahamat in September, 1893, who sold it to defendant in December, 1893; and that Celestina, Ahamat, and the defendant effected in succession necessary repairs and useful improvements at a cost of Rs. 2,000. Defendant prayed that plaintiff's action be dismissed, or in the event of the plaintiff being declared entitled to any interest in the said property, it be further declared that he be not entitled to the possession thereof as against the defendant until plaintiff paid to defendant the amount of the mortgaged debt paid to the administrator of Silva Mudaliyár, with interest, and the sum of Rs. 2,000 expended for repairs and improvements as aforesaid.

Upon evidence taken and considered, the Acting District Judge (Mr. Grenier) found that Johanna was lawfully married to Don Juan on the 28th October, 1850, at the Roman Catholic Church at Peliyagoda; that after the solemnization of the marriage they lived together as man and wife; that they subsequently separated by mutual consent, when Johanna lived with Carolis Appu; that the plaintiff was the issue of the latter union; that Johanna and Don

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1895. Oct. 4 and Nov. 15.

Carolis had no right to sell the property or to pay off the mortgage debt to the administrator of Silva Mudaliyár's estate; and that he was not satisfied that any repairs or improvements had been made by Celestina or others. The Court therefore entered judgment for plaintiff as prayed with costs.

Defendant appealed.

The case came on for argument on the 4th October, 1895.

Layard, A.-G. (with him *Rámanáthan, S.-G.*), appeared for appellant: The alleged marriage of Johanna with Don Juan seems to fall under the Ordinance No. 6 of 1847, which by section 4 enables Christian ministers to solemnize a marriage "in any "place of worship ...., either consecrated or .... licensed "for that purpose, in writing under the hand of the Governor "and gazetted as such." There is no proof that the place where the parties were said to have been married was either consecrated or licensed. Don Juan swears that his marriage took place in the Roman Catholic Church at Peliyagoda in Siyané kóralé, but he does not know even the name of the priest, nor signed any book in the church after the marriage, nor got any certificate of marriage. The marriage register produced is not signed by the parties or the priest who performed the marriage ceremony, and the Regulation No. 9 of 1822, section 21, makes the register of marriage sole legal proof of marriage. Thus the evidence of the solemnization of marriage is altogether defective. Even if proof on that point be assumed to be satisfactory, it would not help the plaintiff, as he failed to prove that the place where the marriage was solemnized was a place of worship either consecrated or licensed for that purpose under the hand of the Governor and gazetted as such. English decisions show that proof of one marriage ceremony, or one religious service held in a place, is insufficient to raise a presumption that such a place was duly consecrated or licensed; and there is no proof in this case that any other marriage or religious service was solemnized in what is called the Roman Catholic Church at Peliyagoda than the ceremony between Don Juan and Johanna. But assuming that the parties were lawfully married, Don Juan did nothing to prevent Johanna from alienating the property in 1888 for the purpose of paying off he joint debt due by him and her to Silva Mudaliyár. He stood by and permitted her to sell the property, and so ratified her act (*Grotius, p. 28,* Masdorp's translation). In any case, the defendant was entitled to retain possession till plaintiff compensated him for the necessary and useful expenses laid out on the property by his predecessors in title, his vendor having received

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from him an enhanced price in consideration of such expenses. And the mortgage debt paid off should be considered *utilis impensa* (*Voet, XVI. 2, 20 ; 3 S. C. C. 31*). Judgment of Berwick, D.J., in D. C., Colombo, 62,563 (3rd November, 1873).

Dornhorst, for plaintiff respondent. [BONSER, C.J.—We shall not trouble you as to the question of Johanna's marriage with Don Juan, but we should like to hear you on the other points.] The passage cited from *Grotius* does not go far enough to support the contention that by the husband standing by, when the wife signed the deed, he ratified it. But there is no evidence that Don Juan knew anything about this deed. Even if he had known of it, *Sande I. c. I.* clearly says that a woman cannot alienate without the authority or consent of her husband, and that from his mere presence at the time of alienation such authority or consent cannot be presumed. Her conveyance is therefore bad, and does not justify defendant's possession under her. Hence she has no *jus retentionis* till the expenses laid out are paid. (Van Leeuwen's *Cens. For. IV. 38, 1 ; Rámanáthan, 1877, pp. 313, 333.*) Defendant has not suffered any damage at all. If he has, he has his remedy against his vendor for breach of warranty. There is no ground for holding that plaintiff and Johanna should be treated as one. The case for the plaintiff rests upon the fact that Johanna could not convey the property by herself. The defendant's title is thus without any foundation whatever.

Layard, in reply, cited Story's *Equity, sections 388 and 389.*

Cur. adv. vult.

15th November, 1895. BONSER, C.J.—

This is an appeal from a decree of the District Court of Colombo. The action was one in which the plaintiff sought to vindicate certain immovable property of which the defendant is in possession. The facts as found by the District Judge or admitted by the parties are shortly these. The property originally belonged to a widow named Christina Rodrigo, who acquired it by purchase in 1870. She had an only child, Johanna, married in 1850 to one Don Juan. In 1888 Christina died, having previously mortgaged the property for Rs. 1,100. At this time Johanna was living with one Carolis Silva as his wife, having many years before separated from her husband Don Juan, who was also living with another woman. Shortly after Christina's death, Johanna and Carolis Silva, as husband and wife, jointly sold and conveyed the property to Celestina Hamine for Rs. 2,400, and the mortgage was paid off out of the purchase money. In 1891 Johanna died intestate, and

Digitized by Google

1895.
Oct. 4 and Nov. 15.
——
BONSER, C.J.

the plaintiff is her son and heir, and also her legal personal representative. On 30th September, 1893, Celestina sold and conveyed the property to one Ibrahim Ahamat for Rs. 4,500, who again in December of the same year sold and conveyed it to the defendant for Rs. 6,000. In 1894 Don Juan sold his undivided share of the property to which he was entitled as Johanna's husband to the plaintiff. The plaintiff therefore claims one moiety through Johanna and the other through Don Juan. The defendant by his answer denied that Don Juan and Johanna were ever married, and alleged that the conveyance to Celestina Hamine was therefore valid. In the alternative, if the marriage be proved, he alleged that Don Juan maliciously deserted Johanna and lived apart from her for twenty-five years preceding her death in 1891, and that thereby Johanna became lawfully entitled to sell and convey the property. He further alleged that Celestina Hamine, Ibrahim Ahamat, and himself had effected necessary and useful improvements on the property, whereby it had increased in value to the extent of Rs. 2,000, and asked for a declaration that he was entitled to retain the property until payment by the plaintiff to him of Rs. 1,100, the amount of the mortgage, and Rs. 2,000 the value of the improvements.

Mr. J. Grenier, the Acting District Judge, gave judgment for the plaintiff and repelled the defendant's claim for retention as bad in law, even if the amount expended in improvements had been proved, which he held was not the case. He found that Don Juan and Johanna were lawfully married.

At the hearing of the appeal, the Attorney-General argued first that there was no proof of the marriage between Johanna and Don Juan. My brother Withers has gone so fully into this part of the case in his judgment that it is sufficient for me to say that I agree with what he has written. That, notwithstanding that both parties were living apart in adultery, they considered themselves, and were considered by their relations, to be man and wife is shown by the fact that in 1874, on the occasion of the marriage of their daughter Johanna, they executed a notarial agreement, in which they made a settlement on their daughter.

It was then argued that Don Juan by his conduct must be taken to have emancipated his wife as it were, and have held her out to the world as being entitled to deal with any property she might inherit as though she were a *feme sole*, and that therefore either the conveyance was valid in law or he was estopped from denying its validity. This argument does not seem to have been urged in the Court below, for the District Judge makes no reference to it in his judgment. No authority was cited to support the proposition

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that when a husband and wife are living apart by mutual consent, the wife can validly alienate the property belonging to the marriage community; and I am of opinion that it is not law. Had, however, it been proved that Don Juan knew of the sale by his wife and raised no objection to its completion, I should have been prepared to hold that he was estopped from denying its validity. But not only is there no evidence of any such knowledge on his part, but there is no evidence that he knew that this property had been inherited by his wife. I am therefore of opinion that this contention cannot be maintained.

There is, however, an objection to the plaintiffs' claim as regards one moiety of the property, which appears to me to be a good one, although it was not expressly raised by the defence or urged on the appeal. The plaintiff claims one moiety as the heir and personal representative of Johanna. Now, Johanna and Don Juan being married in community, the property on Christina's death devolved on the community in equal shares, and on Johanna's death her moiety devolved on the plaintiff. As it would have been inequitable for Johanna to have repudiated her own sale and conveyance, so also it is inequitable for her heir and representative to do so. He is bound to make good the act of his *auctor*, and the defendant may oppose to the claim the *exceptio rei venditæ et traditæ*. That this *exceptio* is available, as well to this defendant as to the original purchaser, Celestina, is clear from the following passage of Voet: *Utitur autem hac exceptione in primis quidem emtor, cui res vendita ac tradita fuit .... ac præterea omnes illi, qui causam ab emtore habent, puta heredes ejus, ipsique etiam successores particulares, in quos ab eo res ex lucrativo vel oneroso titulo translata fuit; adeo ut emtor secundus autori seu venditori primo eam recte objecerit; licet emtor secundus adversus autorem primum ob rem sibi evictam agere nequeat, nisi actiones contra eum ab emtore primo cessæ sint; legibus scilicet facilius exceptionem atque retentionem quam actionem indulgentibus* (*XXI. 3, 4*). And that it is available not only against Johanna herself, but also against her successor, the plaintiff, appears from the following passage from the same author: *Opponitur hæc exceptio non tantum venditori primo, sed et omnibus illis, qui ab eo causam habentes evincere rem emtori primo annituntur quales sunt, quibus venditor jam dominus factus eandem rem rursus titulo sive oneroso sive lucrativo concessit. Sed et heredi venditoris recte opponitur sive defunctus ipse, dum adhuc superstes erat, dominium adeptus sit, et ex defuncti capite experiri heres cupiat, sive heres ipse rei per defunctum venditæ*

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1895. Oct. 4 and Nov. 15. — BONSER, C.J.

dominus fuerit, ut tamen posteriore casu non ultra repelli possit heres rem suam vindicans quam pro qua parte venditori successit (*XXI. 3, 3*). For although the case put by Voet is one where the deceased had sold property which at the time belonged to the person who afterwards became his heir, yet the principle that the heir is bound by the act of his *auctor* and is bound to make it good, or as Perezius Prælectiones, in *Cod. 8, 45, 2,* expresses it, *cogitur præstare factum defuncti,* to the extent of assets descended, even though it be his own property that was sold, will, *a fortiori,* apply to the case where his only title to the property is derived from the seller. I hold, therefore, that the plaintiff is estopped from claiming that moiety of the property which he derived from his mother.

With regard to the other moiety, the case is different, but whether or not he would be liable to make good the sale of this moiety to the extent of the assets descended it is unnecessary now to decide, for it does not appear that any assets did descend.

With regard to the mortgage, I am of opinion that it should be treated as a *utilis impensa.* The property came into the community burdened with the mortgage. It was paid off out of Celestina Hamine's purchase money, and that payment improved the property just as much as if the money had been laid out in material additions to the property. The question then arises, Has the subsequent purchaser a *jus retentionis* in respect of *impensæ utiles* made by his vendor ? Although I can find no direct authority in the Roman-Dutch writers on this point, it would seem to be equitable that should be so, and the passage which I have cited from Voet (*XXI. 3, 4*) favours this view, as also does the following: *Nec dubium, quin illi, quibus jus retentionis a lege vel consuetudine datum est, id ipsum tum ad heredes suos tum ad successores particulares quibus vendiderunt, donarunt, legarunt, aut aliter cesserunt mercedis exigendæ sumtuum ve recuperandorum jus, transmittant* (*Voet, XVI. 2, 20*). I consider that where a possessor, who has made improvements on a land believing it to be his own, sells and conveys that land with the improvements to another, he must be taken to have sold with the land the right to the improvements, and with them the right of defending his possession of them by every means which was available to himself, including the *jus retentionis ;* and this appears to have been the opinion of that eminent jurist Paulus, *Dig. X. 3, 14.* See also *Cod. 8, 45, 28 : Emtori etiam venditoris jura prodesse non ambigitur. Si igitur vobis propter rei proprietatem mota fuerit quæstio, tam propriis, quam venditoris defensionibus uti poteritis.* The question as to the amount expended as *impensæ*

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utiles does not appear to have been sufficiently discussed in the Court below, owing probably to the view taken by the Acting District Judge that the defendant was not entitled to any *jus retentionis* in respect of them.

The rules as to these *impensæ* are correctly summarized by Judge Berwick in his judgment in 62,563, District Court, Colombo, as follows: "The rules as to the extent to which *impensæ utiles* "can be recovered from the owner are given in *Voet, VI. 1, 36,* "*37, and 38,* and may be abbreviated as follows: (1) When the "outlay has exceeded the permanent advantage to the property, the "owner is only liable to the extent to which the property has really "been rendered more valuable by them, (2) and not even to that "amount, if the outlay has been very much greater than the owner "would himself have made; in which case, it is left for the judge "to determine on a consideration of all the circumstances and "persons how much should be recovered. (3) If at the time of "the suit the improved value of the property caused by the expen-"diture exceeds the amount so laid out, still only the sum actually "expended can be recovered from the owner. (4) When a "claim is made for compensation, an account has to be taken of the "mesne profits received; and only so much of the expenditure, "whether made on the production of the fruits or on the property "itself, as exceeds the amount of these profits or *fructus* can be "allowed, subject, however, to the preceding rules. (5) And in "taking this account fruits which have been consumed as well as "those which are still extant must be set off against the clause for "expenditure. The fruits of the expenditure itself however—"*fructus ex ipsa melioratione percepti*—are to be excluded from "the accounting and not to be set off against the claim."

Unless the parties can agree to a sum—which, if they are well advised they will do—the case must go back to the District Court in order that the amount of *impensæ utiles* made by the defendant and his predecessors in title, Celestina Hamine and Ibrahim Ahamat, may be ascertained, in accordance with the foregoing rules, the mortgage being included in the category; and it must be remembered that after the date of the *litis contestatio*, or filing of the answer the defendant cannot be regarded as a *bonâ fide* possessor of the plaintiff's moiety; and he must therefore account for the profits that he might have received as well as those which he actually received.

The order will be that the decree be varied by directing that the plaintiff do recover from the defendant one undivided moiety of the immovable property claimed in this action, with a declaration that the defendant is entitled to retain the same until

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1895. Oct. 4 and Nov. 15.

WITHERS, J.

the plaintiff pays to him such sum as may be ascertained to be due for *impensæ utiles* in respect of such moiety. As to the costs, the plaintiff will retain the decree for the costs of the action, but the defendant will have the costs of the appeal. The subsequent costs will be dealt with by the District Court.

WITHERS, J.—

The subject-matter of this action is a small piece of house property abutting on Hulftsdorp street, Colombo.

The plaintiff seeks to vindicate this from the defendant, who is in *bonâ fide* possession of it and claims to be proprietor.

The plaintiff claims in a three-fold capacity, namely, (1) and (2) as the heir and administrator of the estate of one Johanna *alias* Johanna Silva, deceased, and (3) as purchaser from one Don Juan *alias* Harmanis Appu, husband of the said Johanna.

According to the plaintiff, this property formed part of the common estate of the said Harmanis and Johanna, which the latter brought into the community about October, 1888, on the death of her mother, one Christina Rodrigo, to the estate of whom dying intestate he succeeded as the sole next of kin.

The last mentioned fact is not contested. Johanna's marriage with Harmanis is disputed by the defendant, and at the trial this issue was tried and determined in the plaintiff's favour. That issue, it seems to me, was well decided.

A *primâ facie* case of a legal marriage by a Christian minister in a consecrated building between Johanna and Harmanis about the year 1850 is clearly made out by the testimony of Paulis and Silva, who witnessed its solemnization. The governing Ordinance at that time for marriages solemnized by a minister of the Christian religion was the Ordinance No. 6 of 1847. The 4th section of that Ordinance came into operation when Her Majesty's confirmation of the Ordinance was notified in the *Government Gazette* of December 8, 1849.

A marriage duly solemnized as the one in question must be taken to be good and valid in law.

The 4th section referred to required that, immediately after the solemnization of a marriage according to its provisions, an entry thereof should be made by the officiating minister in a book to be kept for that purpose, in such form and material as the Governor, with the advice of the Executive Council, might prescribe, &c.

I can find nothing in the Ordinance, assuming that the whole of its provisions had come into operation in the district where this marriage was solemnized, which is very doubtful, providing that the marriage solemnized by a minister of the Christian

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religion should be null and void for want of registration. The 6th section of the Ordinance, which nullifies to a certain extent unregistered marriages, does not apply to marriages solemnized by a minister of religion under the provisions of the 4th section.

The attempt to prove later marriages, by Harmanis with another woman and by Johanna with another man, did not destroy the *primâ facie* case of a legal marriage between Harmanis and Johanna. If they were contracted they were bigamous, but, in my opinion, the evidence falls short of proving a later marriage contract by either of these parties.

Then two points were made by the Attorney-General on the assumption of a legal marriage between Harmanis and Johanna. He argued, in the first place, that the facts disclosed such a public abandonment of his wife by Harmanis as amounted to a complete surrender of all control over her person and property. She was virtually emancipated, so to speak, and left free to dispose of her person and property as she pleased.

There would be considerable force in this contention if this view of the case was warranted by the facts, but it is not, in my opinion. Whatever the reason of the spouses for not cohabiting together permanently after their marriage, it is in evidence that the husband used frequently to visit his wife after her return to Colombo, and that as late as 1874 the husband and wife joined in an act of dowry to their daughter Juliana, and that Harmanis, Johanna, and her mother Christina were present at the marriage of Juliana that year.

The second point was that Harmanis acquiesced in his wife's disposal of the house property, and that therefore he and his privy in estate cannot now be heard to say that Johanna had no right to dispose of the property. That argument would have much to recommend it, if there was evidence that Harmanis was present and cognizant of the disposition and acquiesced in it tacitly or otherwise. But this has not been proved. This disposes then of the naked title in the premises.

The next contention for the defendant was that he was entitled to retain possession of the premises until he had received compensation from the plaintiff for necessary and useful expenses effected on the premises. He had not incurred this expense himself, but he had paid for it in the purchase money and had received possession of the premises from his vendor.

Does this *jus retinendi* pass in the sale from one *bonâ fide* possessor to the other without express mention, or does it require a special cession? In his chapter *De Com. XVI. tit. 2, 20*, Voet seems to say that it does pass in the sale, and the authorities to

Google

1895.
Oct. 4 and Nov. 15.

WITHERS, J.

which he refers clearly say so. (See *Dig. de Com. disivando, lib. X., tit. 3, 14, 1.*)

There remains the question, Can the plaintiff, who represents his mother Johanna, recover at all the moiety he derives from his mother as her sole next of kin, which she sold for value to Celestina, and Celestina sold for value to Ahamat, and Ahamat sold for value to the defendant? These contracts of purchase and sale have been specially pleaded in the answer. Is not that a sufficient answer to the claim? If A sells for value and delivers to me a land which does not at the time belong to him; if he acquires it afterwards and brings an action to re-vindicate it, I may defeat him by saying, "But you sold and delivered it to me." I may plead "sale and delivery" with equal effect against the true proprietor who, inheriting the land from my vendor, seeks to revindicate it, and this plea is available to those to whom I sell for value and their assigns. (See *Dig. de XXI. tit. 3, 3.*)

I take the principle on which these pleas rest to be this. The title, whether acquired by the vendor in his lifetime or by the heir on the death of the vendor, relates back to the date of the sale for the benefit of the purchaser for value. Hence, in my opinion, the plaintiff's action for a moiety of the premises must be dismissed.

The representative of Johanna is in no better position than Johanna as to her moiety, and her action could have been well met by the exception of sale and delivery.

In my opinion, the money which went to relieve the property of the burden of the mortgage should be included within a necessary or useful expenditure. Hence the defendant is entitled to retain possession till the plaintiff, as the assign of Harmanis, has paid or secured the repayment of half the mortgage sum, Rs. 1,100. As such assign, plaintiff is further obliged to pay or secure half of the necessary and useful expenses incurred by the defendant's predecessors in possession other than the discharge of the mortgage. These have not been assessed by the District Judge; and the case should go back for this purpose. I concur in the order as to costs proposed by the Chief Justice.

I have had the advantage of reading Mr. Acting Justice Browne's judgment; and while I quite concur with him in regarding the sale of her moiety of the premises by Johanna as no sale at all, I only differ from him in thinking that Johanna could not be heard to say she had not sold it if she had survived her husband and endeavoured to vindicate her moiety from the defendant. If she could be met by a plea of sale and delivery, it seems to me her legal representative or heir-at-law can be likewise.

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BROWNE, A.J.—I regret that I am unable to concur with my Lord the Chief Justice and my brother in limiting the rights of the plaintiff to recover only a moiety of the premises in claim. In proof of the first issue—the alleged marriage of Juan and Johanna on the 28th October, 1850—there were adduced the certificate A which asserts (if the translation be correct) that they were members of the Catholic Church, and that a certain minister solemnized their marriage "at the said church." The name of the church is not given in the extract: it may have been at the head of the page or volume of which the extract is a part. But the deficiency is supplemented by the oral proof, which not only showed that the place was the Roman Catholic Church of Peliyagoda, but sufficiently proved the ceremony to have been a Christian one. Had it not been a marriage to which the provisions of Ordinance No. 6 of 1847 was applicable, but (as the learned Attorney-General contended by the want of the Proclamation, which section 5 thereof required) one the validity of which was to be determined by the provisions of Regulation No. 9 of 1822, any defect in the legality of it for want of registration required by the Regulation was cured by the 3rd section of Ordinance No. 13 of 1863, so long as no proof were given of any subsequent legal marriage of either party with another. Such proof has not been offered here of a legal marriage with Carolis, nor has it been contended that the proviso to that section to protect rights acquired through the invalidity of the first marriage had application here. I however agree with my brother that the provisions of Ordinance No. 6 of 1847 are those by which the rights of the marriage should be proved or challenged, since its applicability to Christian marriages was not made contingent upon proclamation of it, but specially exempted therefrom. And while that Ordinance specified what should be the best proof of any marriage solemnized by a registrar, it did not so prescribe in regard to Christian marriages, so that want of proof of registration is not fatal. Even if it were, however, section 3 of Ordinance No. 13 of 1863 would have the same curative effect.

I therefore agree that the first contention for the appellant cannot be sustained. As to the second and third contentions, I know of no authority for the position that the wife ever could become emancipated from the power of her husband, even though she might have left him for his fault or with his will, and further might have herself lived in adultery. By divorce alone could she in his lifetime have been so freed from his authority, and all her contractual acts thereafter can be of no validity against him when he survived her, save such as she has entered into with his consent

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1895. Oct. 4 and Nov. 15. — BROWNE, A.J.

and authority, or those when he was *præsens atque sciens*, of which here no proof has been given. I fail, however, to see how his *fictus consensus* by mere presence and knowledge if proved could so supplement her notarial acts as to pass title by her deed. Before entering into the consideration of the ulterior questions, I would wish to have it remembered—what the judgment of Mr. Berwick, D.J., quoted by my Lord the Chief Justice, indicates to me should be borne in mind—that the *bonâ fide* possessor may on eviction have his claim for compensation partly against his evictor and partly against his vendor; and that even though plaintiff here is as to a moiety the administrator of a vendor, defendant's predecessor in title, Johanna, was only one of two such vendors, and that it might be possible that a Court before whom Celestina's ultimate action might be tried might feel itself justified in giving judgment against Carolis solely and not against her, so that plaintiff ought not now to be regarded as aught save an evictor.

In the absence of all authority from her husband, I feel it incumbent upon me to hold that the alleged sale and conveyance by Johanna to Celestina fell under the general rule. Voet (*XXIII. 2, 42*): *Ex hujusmodi contractibus neque maritus neque uxor stante aut soluto matrimonio, conveniri queant sed contractus ipso jure nullus fit.* To this rule there were possibly exceptions in two instances,—when the contract of the wife was regarded as *in suspenso usque ad mortem viri quo tempore mulier jam sui juris effecta possit ex contractu a se inito ...... quia res pervenerit ad eum casum a quo incipere potuerat* (*Sande Dec. Fris. II. 4, 2*), and when both the *maritus et uxor locupletiores facti sunt* (*Voet, ibid, 44*) by the result of her transaction. This case is not within either exception. The husband survived her and may be even still alive. She never became *sui juris* to enable the results consequent thereon to follow; and I find no authority that in a case of this kind, on her death first occurring, her half of the community or her heir had that which till then was ineffective made effective against them. And when her paramour and she pocketed the Rs. 1,300. net surplus of the price Celestina paid after thereout paying the Rs. 1,100 mortgage, the husband certainly did not become *locupletior* thereby. I do not indeed see that the mere realization of the net cash value of any of the property of the matrimonial community could be said to make the spouses *locupletiores*. Even if it could be so regarded in some cases, has the husband here in truth been at all enriched? When now seven years after his wife's alleged sale of the property he seeks to reclaim it, he can do so (as we are now holding) only after repaying the money

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disbursed in discharge of the mortgage and the various *impensæ* allowable against heirs, or may have to wait patiently for some years to come till the rents and profits recoup these to the *bonâ fide* possessor. Even though his interest on the former of these is reduced by 3 per cent., I cannot regard it to be proved that he has been enriched. I regret therefore that I cannot agree with my Lord the Chief Justice and my brother in holding either that the wife ever sold and delivered this property or so entered into any legal transaction, and that the exceptions thereof could be allowable to her purchaser and the plaintiff, thereby limited to a right to reclaim only the husband's half of the property after the death of the wife. I consider he should be allowed to vindicate the entirety on payment of all these charges. My regret is lessened by the consideration that such a ruling would be in maintenance of the original marital power, and that if the successive purchasers are driven to reclaim their moneys from their respective vendors, Carolis the paramour and other representatives and not the plaintiff in his capacity of the wife's administrator, may be the one who will have to repay Rs. 2,400.

Defendant limited his further defence beyond title to this averment that Celestina Hamine, and thereafter his successors in title, including himself, had effected necessary and useful improvements and repairs [he claims no *impensæ voluptuariæ* on the premises by erecting new buildings and otherwise, and that thereby the premises have been increased in value to the extent of Rs. 2,000. He filed no accounts particularizing the same, nor stating by whom they were effected, nor showing what rents and fruits therefrom came to him for which he might possibly be held liable to account.

The only proof offered on the subject is that Celestina Hamine as to repairs, renovated the roof, two windows, and a door when they were rotten, and as to improvements, built two fresh walls, and pulling down one house built an upstair house in its stead.

These works cost Rs. 2,200, and the rent rose from Rs. 20 to Rs. 55 a month. The augmentation of rent would thus have repaid by this time the principal outlaid. The evidence thus shows that defendant himself expended nothing, and his claim to what would in effect be an hypothecary decree for retention till he had recouped outlay out of rents, rests solely upon the facts of Celestina's outlay.

While so far as I can see from Voet (*XVIII. VI. 9 and XXI., II. 17*), the right to sue (as in *3 S. C. C. 30*) for the value of improvements to land would have to be expressly ceded to a purchaser, I agree that the *jus retentionis* and the defence

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1895. Oct. 4 and Nov. 15.

BROWNE, A.J.

thereof here pleaded passes under the authorities cited by my brother without such cession. But the question arises in respect of what items and their value will this right be allowed ?

In his judgment Mr. Berwick, D.J., pointed out as the result of a comparison of Voet (*V. III. 21 and VI. I. 36*, how much less both the correlative rights of retention and liabilities for past profits recovered are when property is recovered *rei vindicatione* from a *bonâ fide* possession than in the case of the recovery of the inheritance. In the former case, such as here, the possessor accounting only for fruits not yet consumed has right in accounting to claim for all *impensæ necessariæ*. As to *impensæ utiles* in so far as they rendered the property more valuable, he may recover the amount thereof when they do not exceed the amount of the increased value : when they exceed the *utilitas* or *melioratio* found at the date of action he may even recover the excess, unless, in the opinion of the Judge, founded on personal and other considerations, the excess is too great or the true owner would not have incurred them, in which cases, as also in the case of *impensæ voluptuariæ*, he may remove whatever would be of use to himself as far as he can *sine rei detrimento*, or else receive payment of as much as it may be held the true owner would have spent.

Unless therefore the parties shall agree as my Lord has suggested, the action must be remitted, and the defendant should, in my opinion, file schedules of all works done, distinguishing them into these three classes, and of all profits received since action brought. Though defendant does not admit any outlay was for luxurious purposes, plaintiff might so classify some of it, and the Court would have to classify all the several moneys outlaid, and determine which the plaintiff must pay. He then could be given the option of paying such amount, and in default thereof the Court would declare the respective rights of retention, and (on its expiry) of removal of the still useful subjects of the past *utiles et voluptuaria* outlay which plaintiff does not require, and defendant may remove without injury to the property. I agree that the Rs. 1,100 and legal interest should be included among the *impensæ utiles*, and that the property should be regarded as still ameliorated thereby, so that the *jus retentionis* shall obtain in respect of it, especially in view of the favour in which this Court regarded such payments *1 Lor. 128 and 3 Lor. 235.*

I would, however, make the relief thus allowed and rights declared applicable to the whole of the plaintiff's claim and the whole of the defendant's outlay in cash that shall be allowed.

I would allow plaintiff's costs in the lower Court hitherto incurred, and defendant have costs of this appeal.

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In the Matter of HAYMAN THORNHILL, Insolvent.

1895.
September 20.

D. C., Colombo, 1,822.

Appeal—Delay in forwarding appeal—Insolvency Ordinance—Civil Procedure Code, s. 438—Description of insolvent—Debt of petitioning creditor—Motion for annulment of adjudication of insolvency —Technical objections.

A District Judge has no right to delay the forwarding of a case in due course to the Supreme Court after the appeal has been perfected.

It is sufficient if a petitioning creditor's debt is proved in accordance with the form in the schedule to the Insolvency Ordinance.

The Civil Procedure Code does not effect proceedings under the Insolvency Ordinance, and an affidavit proving a debt in insolvency proceedings need not, therefore, be in accordance with section 438 of the Code, but may follow the form given in the schedule to the Ordinance.

In a petition to have a person declared insolvent it is not sufficient to state his name only, but his description and address should be given.

One of several partners of a firm having petitioned to have a person declared insolvent on the footing of a debt due to the firm, it was objected that the petition was irregular, inasmuch as the debt was not due to the petitioner only, and that he should have produced the power of attorney authorizing him to sign for the firm :

Held, that the objections were too technical to be given effect to, in the absence of some injustice suffered on the merits.

One partner of a firm may sign such petition for himself and on behalf of the others without a power of attorney from the latter.

THE facts of the case are set out in the following judgment.

Dornhorst appeared for the creditor appellant ; *Bawa*, for insolvent respondent ; *Chapman*, for petitioning creditor.

20th September, 1895. BONSER, C.J.—

This is an appeal by a creditor of a person who is described as Hayman Thornhill, of Colombo. Whether that person is male or female, or whether it has any occupation or business, does not appear.

The insolvent was adjudicated insolvent on the petition of one William Jenkins, who gives the vague address, Colombo. The appellant is a creditor, and he objected to the adjudication and moved that it be annulled. That application was refused, and he has appealed to this Court. The appeal was perfected on the 22nd July, but the papers were not transmitted to the Supreme Court until the 31st of August, and they were not received here till the 3rd of September, whereas they ought to have been sent on or soon after the 22nd of July.

This detention of the proceedings was quite irregular. The District Court has no right to take upon itself to delay an appeal.

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1895. September 20. BONSER, C.J.

That this was done intentionally appears from the fact that it is recorded that a motion was made on the 7th of August, 1895, by the proctor for the insolvent, that " the record be not forwarded " to the Supreme Court until after the 15th instant." The District Judge, instead of dismissing that motion with costs, allowed it to stand over for a few days. I mention this because I wish it to be understood that a District Judge has no right to delay appeals.

The objections taken to the jurisdiction were of a highly technical nature. The first was, as I understood it, that the petition was not the petition of the real creditor, but was only the petition of one of several joint creditors. The debt was not due to William Jenkins, but was due to him and his co-partners, who were trading under the firm of Cargill & Co. Strictly speaking, the petition ought to have been the petition of the three persons to whom the debt was due. But that objection is a purely technical one, and I do not think the Court is bound to give effect to it, unless some injustice has been done. It appears on the face of the petition that it was a debt due to the firm. Then it was said that the power of attorney ought to have been produced empowering Mr. Jenkins to sign the petition on behalf of his partners. But I do not see that that is necessary, for, in the form given in the schedule to the Ordinance (form B), there is a note which sets out " if the petition be by " partners, alter the form accordingly, and let it be signed by one on " behalf of himself and partners." Strictly speaking, either all three partners ought to have signed the petition, or it should have been signed by the one partner, William Jenkins, on behalf of himself and his two other partners; but that is a pure technicality which does not in any way affect the merits of the case.

Then it was said that there was no proper proof of the petitioning creditor's debt, but the proof given was in accordance with the form in the schedule, and was sufficient. Another objection was, that the affidavit verifying the petition does not state that it was signed, as well as sworn, before a Justice of the Peace as required by section 438 of the Civil Procedure Code, but we have held in a recent case that the Civil Procedure Code does not affect proceedings under the Insolvent Ordinance, and the form given in the Insolvent Ordinance does not require more than that the affidavit should be sworn before a Justice of the Peace. Therefore that objection fails.

I think, therefore, there is no ground for setting aside this adjudication, and the appeal must be dismissed. At the same time I should point out that the petition appears to have been drawn

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very carelessly. It is not sufficient merely to describe a person who is petitioned against as Ram Menika or John Smith of Colombo. The description and address of the person should be given so that creditors and other persons concerned may know that the person who is to be adjudicated insolvent is their debtor, and the person with whom they have had dealings, and in whose affairs they are interested.

1895.
September 20.

The appeal will be dismissed, but there will be no costs.

WITHERS, J.—I agree.

In the Matter of the Last Will and Testament of JOHN ARON FERDINANDUS.

1895.
September 26.

D. C., Colombo, C 570.

Formal order of court—Probate—Caveat—Ex parte order—Notice of appeal—Civil Procedure Code, ss. 535 and 526—Useless motions.

An order to be treated as such must be formally drawn up and recorded as required by the Civil Procedure Code.

After an order absolute in the first instance under section 529 of the Civil Procedure Code granting probate of a will to an applicant has been made, it is too late to enter a caveat under section 535.

If the probate has been granted wrongly, it may be recalled under section 536.

Such an order upon a motion, notice whereof was not given to any person, is an *ex parte* order, although it was made after such person had appeared and opposed the motion, and no notice is necessary to be given to such person of an appeal preferred by the applicant.

When an application for probate is once allowed, there is no necessity for further motion that probate do issue to the applicant.

ON the 1st March, 1895, Louisa Karunaratna, who was named in a document which purported to be the last will of J. A. Ferdinandus, deceased, as his executrix, presented to the District Court a petition and affidavit, together with the said last will, and, in terms of section 525 of the Civil Procedure Code, moved for probate thereof, alleging that she had no reason to suppose that her application would be opposed by any person. The District Judge made an order absolute, under section 529, declaring the will proved, and that probate do issue on her taking the oath of office. Six days afterwards certain persons filed in Court a document in the nature of a caveat. The petitioner, ignoring this opposition, took her oath of office and moved *ex parte* that "probate be granted" to her. The caveators appeared and opposed the motion. The Court ordered that the petition and affidavit

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1895. September 26. Bonser, C.J.

filed by Louisa Karunaratna be taken off the file, and that she do file a fresh petition and affidavit naming the caveators as respondents.

The petitioner appealed as from an *ex parte* order.

Rámanáthan, S.-G. (with him *Pereira*), appeared for her.

Layard, A.-G., appeared for the caveators and took the preliminary objection that they had not received notice of appeal.

Rámanáthan, S.-G.—No notice is necessary, as the order of the Court below should be looked upon as *ex parte* notwithstanding the appearance of the so-called caveators. Probate had been duly allowed, and therefore the remedy by caveat was not admissible, and the so-called caveators are not respondents truly. [Bonser, C.J.—We think the preliminary objection must be overruled.] If probate had been allowed improperly, the right course is to recall it, under section 536. As the case now stands, probate being now granted and the oath of office taken, it is the duty of the secretary to issue probate as a matter of course.

26th September, 1895. Bonser, C.J.—

This is an appeal against an order of Mr. Grenier, Acting District Judge of Colombo, in which he ordered that the petition and affidavit filed, together with the schedule referred to therein, be taken off the file, and that the appellant, as executrix, do file a fresh petition and affidavit, naming the caveator and the persons mentioned in Mr. Alwis' appointment of date the 6th March, 1895, as respondents, and that proceedings be thereafter taken by the executrix as in the case where respondents are named in a petition of this character. This, although it is called an order, is not an order. No formal order has been drawn up and recorded; but we will treat it as if a formal order has been made as required by the Code.

The executrix appealed against that order.

The Attorney-General, at the opening of the appeal, appeared and took a preliminary objection. He said that he had received no notice of the appeal, and that, therefore, the appeal should not be heard without notice to his clients. The Attorney-General appeared on behalf of Elizabeth Ferdinandus and five others, who appear to have entered a caveat after the order for probate had been made.

The appellant was executrix of the will of the deceased, and she petitioned that probate should be granted to her, and bringing the will into Court she filed an affidavit under section 525, naming no person as respondent to the petition. Thereupon the Court

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under the powers given by section 529, made the order absolute in the first instance. After that order had been made these five persons filed their caveat under section 535; but in my opinion they were too late, because the order had already been made, and they are therefore not parties to the proceedings, and they were rightly not served with notice of the appeal, which is an *ex parte* one.

In consequence of this filing of a caveat the secretary of the District Court declined to issue probate as ordered by the Court. Thereupon the executrix took the curious step of moving the Court that probate be granted to the executrix named in the will, although an order to that effect had already been made. I cannot understand why the Court should make an order over again; but there seems to be a rage in the District Court for making motions, for, even after the petition had been presented, a motion is made by the petitioner that the prayer of the petition may be granted. Why it was thought necessary to supplement the petition by a motion I cannot understand. We were told that it was the practice in the District Court to supplement a petition by a motion in this way. If this be so, the sooner this practice is discontinued the better. When a petition has been presented it ought to come on for hearing in regular course without any motion for that purpose. However, on the second motion, the caveators were heard, and the Acting District Judge made the order, which is now appealed against. I must say that I do not understand the grounds on which that order was made.

The procedure laid down by the Code seems to be quite clear. If the probate has been wrongly granted it may be recalled under section 536. Section 537 points out how an application to recall probate is to be made. It is to be made by petition. The caveators instead of entering a useless caveat, should have applied under section 537 to recall the probate. That they can do now, but, in my opinion, the order was wrong. The procedure invented by the learned Acting District Judge is not in accordance with the Code. There is no justification for it. The appeal must therefore be allowed.

WITHERS, J.—

I quite concur. If the District Judge had satisfied himself that the petitioner had abused the process of his court by the suppression of some material fact in the affidavit supporting her petition for grant of probate, I think it would have been quite competent to him to have discharged the *order nisi*.

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1895.
September 26.
WITHERS, J.

But that is not the reason given by the learned District Judge for his decision that the petition and affidavit should be taken off the file. He seems to have thought that the course he decided to take was the only way to deal with a state of circumstances for which the Code, in his opinion, had failed to provide. In this I think he was mistaken, for the Code plainly indicates by what time a caveat for the purposes of section 535 must be filed.

A caveator must come in before the final hearing of the petition and the order thereon.

The caveators intervened too late to be in any sense parties to the matter of the petition. If they have a right to ask for the revocation of the grant, they must do so in the way provided by the Code.

1895.
September 18.

CORNELIS *v.* ULUWITIKE.

P. C., Galle, 16,679.

Irregularity in recording evidence—Ordinance No. 22 of 1890, s. 12—Criminal Procedure Code, s. 472—Conviction in the alternative—Warrant issued in the Sinhalese language.

Evidence recorded in a proceeding against A, which disclosed an offence on the part of B, who was not present, cannot be made use of against B on a subsequent day when arrested and brought up by reading over to the witnesses in the presence of B the evidence already recorded, and examining them further and allowing B an opportunity to cross-examine the witnesses on the whole evidence. The proper course is to record their evidence afresh.

The Penal Code does not provide for a conviction in the alternative, and therefore a conviction for " dishonestly receiving or " retaining stolen property " is irregular.

Per BONSER, C.J.—There is no authority in our law for the issue of process in a foreign language. The language of the Ceylon Courts being the English language, serious doubts might arise as to the legality of an arrest upon a warrant issued in such form.

THE facts of the case are sufficiently stated in the judgment of his Lordship the Chief Justice.

Dornhorst, for the appellant.

18th September, 1895. BONSER, C.J.—

In this case the appellant, one Robert Uluwitike, was convicted of "dishonestly receiving or retaining a gold hairpin worth Rs. 25, " the property of L. W. Cornelis, knowing the same to be stolen " property," and sentenced to undergo six months' rigorous imprisonment There appears to have been some irregularity in the

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proceedings in this case. In the first instance, a man called Urudihami was charged and brought up by the Vidáné Arachchi. Mr. Moor, who was then Acting Police Magistrate of Galle, took evidence on the charge against Urudihami. On the evidence given on this charge it appeared that the appellant was the person from whom Urudihami had got the property, and the evidence pointed to Urudihami as having been innocently in possession of it. At that stage of the proceedings the Police Magistrate issued a warrant for the arrest of the appellant. He did not deal with Urudihami's case, and the proceedings against him would appear to have dropped, for nothing more was done.

Then Robert, the appellant, was arrested upon that warrant and brought up before the Police Court of Galle, where Mr. Hellings was at the time presiding. The witnesses who had been heard before Mr. Moor on the charge against Urudihami were called as witnesses for the prosecution on the charge against the appellant. But they did not give their evidence afresh, as they ought to have done. The course pursued was that the Magistrate read out to the witnesses the evidence given by them on the previous charge against Urudihami, and then examined them further. It is said that this course was justified by section 12 of Ordinance No. 22 of 1890. But in my opinion that section has nothing to do with a case like the present one. It seems to me that that section refers to a case under section 472 of the Criminal Procedure Code, which provides that where an accused person has absconded, the Court competent to try or commit for trial may examine witnesses in his absence and record their depositions, and then when the accused is arrested and brought up those depositions may be given in evidence, if the witnesses are dead or incapable of giving evidence, or their attendance cannot reasonably be secured. It seems to me that the 12th section of Ordinance No. 22 of 1890 went a step further, and provided in such a case that the proceedings might be shortened by reading over the depositions in the presence of the accused. But before section 12 can apply, it appears to be necessary that there must be a person accused, and that that accused must be one and the same person. It could never have been intended that that section was to apply to a case where the evidence was given on the trial of a different person, and therefore what was done in this case was irregular. I observe that the witnesses did not even swear that what they said on the previous occasion was true.

Then the question arises, is this irregularity such an irregularity as to afford sufficient reason for setting aside the

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1895. September 18. — Bonser, C.J.

conviction ? Did it in any way prejudice the accused ? As to this, I fail to see that it did prejudice him, and therefore I do not think that this irregularity is sufficient ground for setting aside the proceedings.

There appears to be a further irregularity in the conviction.

The appellant is found guilty of dishonestly receiving or retaining a gold hairpin. Under our Code it seems that a conviction in this form is irregular. Under the Indian Penal Code such a conviction is allowed. Section 72 of the Indian Penal Code expressly provides for a conviction in the alternative, but by some slip that section was not included in our Penal Code, although when our Criminal Procedure Code was borrowed from India the clause which gave effect to section 72 of the Penal Code was left standing. I refer to the last clause of section 210 of the Criminal Procedure Code. But this is a defect which can be amended, and therefore I order that the conviction be amended by striking out " or retaining."

Then, on the merits, it was urged that the evidence was insufficient to support the conviction of dishonest receipt of stolen property. But, if the evidence is to be believed, there was sufficient evidence. The conduct of the accused in running away when some difficulty arose about its disposal, and the Vidáné Arachchi was called in, points to a consciousness of guilt, and therefore I see no reason to interfere with the conviction or sentence.

I notice that there is put up in the paper-book what purports to be a warrant of arrest, in what seems to be the Siṇhalese language.

I do not understand under what authority process is issued in a foreign language, and the Solicitor-General who was in Court at the argument professed himself unable to explain how this process came to be issued. The language of our Courts is the English language, and it appears to me that serious doubts might arise as to the legality of an arrest upon a warrant in such form.

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JIVARATNAM *v.* MURUKESU *et al.*

1895. *September 10.*

D. C. Jaffna 25,089.

Thésawaḷamai—*Husband and wife*—Muthusam—Thediathettum—*Land bought by husband with money inherited by him—Separate property of husband.*

According to the *Thésawaḷamai* of Jaffna, money inherited by a husband and converted into land does not form part of the *thediathettum.* Such land should be treated as his separate property, if the money can be ear-marked.

IT was alleged in the plaint that upon the death of one Tamotharam, his executor, Selvanayagam, sold the land belonging to the deceased to one Suppramanian Chetty, and that the latter re-sold it to Selvanayagam in his private capacity ; that the price paid for it by Selvanayagam was part of money which he inherited from his mother ; that he possessed the land till his death in June, 1894, and that thereupon his executor sold it to the plaintiff. Plaintiff now complained that defendant had unlawfully ousted him, and he prayed for a declaration of title, restoration of possession, and damages.

The defendant admitted the sale of land by Suppramanian Chetty to Selvanayagam, but denied that he bought the property out of *muthusam* inherited from his mother.

He pleaded that Selvanayagam bought it out of money acquired by him and his first wife Tangamuttu, a daughter of one Appa Chetty ; that when Appa Chetty died intestate, his heir leased his share to the first and third defendants (the second defendant being the wife of the first). The defendants denied having ousted plaintiff from the half share to which Selvanayagam was entitled.

The District Judge framed the following issues :—Was this land sold on the 15th of June, 1883, to the late Selvanayagam during the lifetime of his wife Tangamuttu, or after her death.

And he refused to accept another issue suggested by plaintiff's counsel, viz., whether the land in question was purchased from money inherited by Selvanayagam from his mother or with money belonging to the joint acquired estate of Selvanayagam and his wife Tangamuttu.

He made order as follows :—" I refuse to add this issue. There " is no provision of the *Thésawaḷamai* known to me, providing that " if a person inherit cash or movable property, and afterwards " purchase a land with the cash or price of the movable property, " such acquired land becomes part of the *muthusam,* or

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1895. September 10. — WITHERS, J.

"inherited estate. I hold that the *muthusam* is the property in "the state in which it is inherited, and that the profits, &c., "realized and re-invested cannot be held to create a new class of "*muthusam*, and so on indefinitely.

"This land, it is admitted, never formed part of Selvanayagam's "parent's estate, but was bought by him during his wife's life. He "may, or he may not, have had a right to set-off when dividing the "estate of himself and wife against the wife's share a sum of money "brought into their joint account as *muthusam* cash. The fact "that he called this *muthusam* money in the deed of purchase, to "which the wife is not a party, will not affect the right of the wife's "heirs to have this land treated as a joint asset.

"It strikes at the root of the *Thésawalamai* to suppose that a man "or woman can after marriage go on trading without community "in the proceeds of their *muthusam* property. The rights in those "original properties remain sole rights, but all acquired property "derived from them, by re-investment, exchange, accumulation. "&c., pass into the joint account, subject as already remarked, to the original claim for the *muthusam*, as it was when the joint partner-"ship as man and wife was undertaken."

Plaintiff appealed against this order refusing the suggested issue.

26th August, 1895. *Rámanáthan, S.-G.*, appeared for appellant and cited Mutukistna's *Thésawalamai*, *pp. 33, 130, 182, 260, 325.*

Sampayo, for respondent.

Cur. adv. vult.

10th September, 1895. WITHERS, J.—

We have to decide an interesting point in the customary law of Jaffnapatam, and it is this. Is land which has been acquired by one of the spouses during wedlock with money bequeathed under a will and received during wedlock to be regarded at the death of that spouse as his or her separate and exclusive property devolving on his or her heirs at customary law ? The different kinds of property when speaking of married persons are well known. What is brought into the marriage by the husband is called *muthusam* property, what is brought in by the wife is called *chidanam* (*stri-dhanam*) translated dowry property.

The one is the husband's separate property, to which the sons succeed : the other the wife's, to which the daughters succeed. What is acquired (*thedapatta*) during wedlock is called (*thediathettum*) acquired property. Acquired property is not further

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defined in the in the *Thésawalamai*. It is regarded as joint estate of the spouses, and is divided among the sons and daughters on the death of the surviving parent.

Chapter IV., section 3, of the above Code declares that a gift of land to either spouse is to be regarded as separate property of the spouse who has received the gift, though if alienated during the marriage no compensation is to be made out of the other spouse's estate. Only the proceeds (? profits) of the land are to swell the *thediathettum*. The same rule is applied to slaves and cattle or anything else which may be increased by procreation, with this difference, that the progeny remains the property of the spouse presented with the original slave or animal.

Were donated land, slaves, and cattle excluded from the *thediathettum* because of the importance of such kinds of property to the fortunate owner of them ?

But what of a bequest of money converted into land by the donee ?

Is this within the principle of that rule ?

In *Toussaint v. Vesentipulle* and others (1856), reported in *Mutukistna, p. 325,* the then District Judge held that a bequest of money came within the principle of the section just referred to.

This was (apparently) an action by a creditor of a husband to recover a debt contracted by the latter during coverture, and he sought to levy a sum of money as assets of the *thediathettum*, and so available for his writ.

It was contended that this was not a pure bequest of money, but payment for services rendered by the wife, who however claimed it as separate property by donation.

The Supreme Court set the judgment aside, being of opinion that the creditor appellant was entitled to draw the money for his judgment debt. No reason was given in the judgment.

It may have been that the Supreme Court considered the money to be compensation, and therefore money acquired by the wife for domestic services rendered by her, and not to be a free unearned gift. The distinction is important in view of the opinion of Judge Wood, given in 1848, that " the only property in which both spouses have " a material interest and is in common is the property (? rents, " incomes, and profits) arising from each of their respective pro- " perties " (the *muthusam* and *chidanam*), or " what is acquired by " their own exertions during their marriage." This opinion received the sanction of Sir Anthony Oliphant, C.J., in *Valliama v. Loopen* (*Mutukistna, p. 260*).

It was held by Judge Price in the case of *Sanmogam v. Sinnecooty* (*Mutukistna, p. 33*) that a parcel of land " bought with

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1895. September 10. —— BROWNE, J.

"money hereditary property of the deceased," one Sangarapillai during his marriage with his first wife, did not form part of their *thediathettum*, but was his separate property devolving according to the country law. This was affirmed in appeal by Sir Charles Marshall, C.J.

It does not appear from the report what was meant by "heredi-"tary property," whether *muthusam*, oddly enough translated "hereditary property" in *Mutukistna*, *p. 1* (in which case there could be no doubt that the land if acquired by capital money would be regarded as *muthasam* and separate estate), or money to which the husband succeeded as next of kin. If the latter, the decision seems to me to be in favour of the Solicitor-General, who cited it. If it was acquired during marriage by descent, why did it not fall into the *thediathettum ?*

It could be excluded only because it was a free gift and not acquired by the executors of either spouse, or the production of the profits, or income, or revenue of the separate property of either spouse.

It really comes to this, that according to the *Thésawalamai* as interpreted by decisions, the separate property of spouses is that which either party brings to the marriage or acquires during the marriage by inheritance or donation made to him or her particularly, while common property is restricted to the rents, revenue, and income of their separate estate, and what is acquired by the exertions of the spouses.

The Solicitor-General, if I understood him rightly, carried his argument to this length ; and though at the time I was not prepared to assent to that view of the law, I am inclined to do so now, in view of the second case above mentioned. As, however, it was assumed for the purposes of argument, and for that purpose only, that plaintiff's predecessor in title bought the land in question with his mother's legacy, the case must go back for that question of fact, *inter alia*, to be determined, for unless the money can be ear-marked, so to speak, the plaintiff's case on that point fails.

Set aside and send the case back for trial, with the opinion of this Court that the land is to be treated as the separate property of the purchaser if he purchased it with money specially donated to him by his mother, but not otherwise.

BROWNE, J.—

I agree. Some previous owner of my copy of Mutukistna's work has corrected the text on page 261 into, "is the *profits* arising from "each of their respective properties," which would seem to be more in accordance with the sense and principle.

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The precedents cited by the Solicitor-General from pages 182 and 267 certainly show that investments or transmutation of the character of the property will not affect the rights which belonged to it in its original character, and the decision on page 130 would appear to have proceeded upon the consideration that the fund out of which the lands were purchased was not ear-marked.

1895.
September 10.
BROWNE, J.

SOYSA *v.* ALWIS *et al.*

D. C., Colombo, M 5.

1895.
Sept. 6, 10.

Civil Procedure Code, s. 642—Application of mortgagee to have deceased mortgagor's estate represented—Estate under Rs. 1,000—Death of mortgagor before Code came into operation.

Under the proviso of sect on 642 of the Civil Procedure Code, it is competent for the District Court, upon an application made in respect of a mortgage of less value than Rs. 1,000, to appoint a person to represent the deceased mortgagor's estate for the purposes of the action intended to be raised for the recovery of the mortgage debt.

The proviso stands independently of the testamentary chapters of the Code, and applies to cases where the deceased had died before as well as after the Code came into operation.

THE executrix of one Jeronis Pieris, to whom one R. D. Thomas had mortgaged some lands in order to secure a loan of Rs. 500 and interest, moved the District Court that the widow of the deceased mortgagor be appointed to represent his estate so as to enable her, the executrix, to sue upon the bond.

The Acting District Judge (Mr. Templer) disallowed the motion, as the mortgagor appeared to have died before the Code came into operation.

On appeal, *Bawa* appeared for the executrix.

10th September, 1895. WITHERS, J.—

I think the present case is distinguishable from the case cited before the learned District Judge and relied on by him, viz., *Nagappen v. Maimanchy, 9 S. C. C. 197.* That case, which concerned a mortgaged estate worth over Rs. 1,000, decided that the mortgagee himself could not be appointed administrator of his mortgagor's estate and effects under section 642 of the Civil Procedure Code, and confirmed a previous ruling that the administration clauses of the Code apply only when the intestate shall have died after the passing of the Code.

Section 642 relates to two different states of things. If the mortgaged property of a person dying intestate amounts to Rs. 1,000 the mortgagee cannot bring a hypothecary action unless he has

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1895.

Browne, J.

procured the appointment of an administrator to the estate and effects of the deceased mortgagor under the provisions of chapter XXXVIII. of the Code. The administration may be a general or a limited one, as under the provisions of section 539. If the mortgaged property is under the value of Rs. 1,000, the mortgagee who desires to enforce his hypothec may apply to the Court to appoint some person to represent the estate of the deceased for all the purposes of the action.

In the first case the mortgagee is compelled to apply under the provisions of chapter XXXVIII., which, on account of the express language contained in it, was held not to apply to estates where the deceased had died previous to the Code coming into operation. See *Muttupillai v. Sellamma, 9 S. C. C. 179.* But in this case the procedure is given under the chapter without reference to. the testamentary chapters, and may be considered apart by itself. It is not apparent that any right is affected by this procedure, and there is no indication that it will not apply to cases where the deceased had died before the Code came into operation. Indeed, this chapter is intended to apply to cases where the mortgagor is dead (see section 641). I think we ought to give effect to the new procedure, wherever it is possible to do so, for I should have thought the object of a Procedure Code—unless otherwise expressed—was to deal with past as well as present procedure.

For these reasons I hold it competent for the Judge, if it appears to him necessary or desirable, to appoint a person to represent the deceased's mortgagor's estate for the purposes of this action. This is a matter for his judicial discretion. Of course he cannot do so if there is an executor or administrator already appointed, or if the property mortgaged is not less than Rs. 1,000.

Browne, J.—

The decision in *9 S. C. C. 197* was upon an application made under the first part of section 642, and is applicable thereto only, and not to the proviso thereof under which the present application is made for the enforcement of a bond secured by a mortgage of less than Rs. 1,000 in value. I am glad there is no obstacle by precedent to the new procedure whereby the old proceedings in such a necessity against all the heirs may be abrogated by the simpler expedient here made, and that we can follow the precedent of the decision of Lawrie, J. (1,422, C. R., Kalutara, *S. C. M., 14th May, 1895*), who upheld (though not after argument of this point) the right of a Court of Requests to appoint a representative to the estate of the mortgagors who had died thirteen years previously.

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ARMITAGE *et al.* v. BROWN.

1895. *Jan. 31 and Feb. 8.*

D. C., Colombo, 3,819.

Innocent misrepresentation—Principal and agent—Absence of authority to act for principal—Liability of agent for damages.

If A is induced to contract with B on the footing of an innocent misrepresentation, he would have a restitutive remedy against B, restoring to him what he had actually lost in consequence of entering into such contract.

If A is under a legal duty to tell the truth to B, he would be liable for the consequence of an innocent misrepresentation made by him under the belief of which B acted.

Where A, without being armed with formal authority, professed to act as agent of B, and bade for at a public auction, and agreed to buy a house as such agent, and B repudiated the sale, and C, the vendor, sued A for damages,—

Held, per WITHERS, J., and BROWNE, A.J. (*dissentiente* LAWRIE, A.C.J.), that, in the absence of fraudulent intent or recklessness, A was not personally liable in damages; and that he had not entered into a valid contract with C, nor was he under a legal duty to him to state the truth.

PLAINTIFFS claimed Rs. 2,850 as damages from the defendant on the basis of the following allegations: that they caused to be put up for sale by public auction a house in the Fort of Colombo; that defendant, pretending to have full authority to act for the Bank of Madras, and upon his warranty that he was authorized by the said bank to be such agent, and to bid for and purchase the said house, and do such other acts as may be necessary therefor, induced the plaintiffs to accept his bids and to conclude the sale with him; that defendant, professing to act as such agent, induced the plaintiffs to accept his signature for and on behalf of the said bank to the notarially attested conditions of sale, and to enter into the contract therein embodied; that the plaintiffs, having entered into the said contract with the defendant, were always ready and willing to fulfil their part of the obligation under the said conditions; that the said bank has repudiated the said conditions and contract; and that defendant was not in fact authorized to bid at the sale or to subscribe its name to the conditions.

The defendant pleaded that the plaint was bad in that, *inter alia*, it did not allege that defendant made false representations knowing them to be false, or that he knew that he had no authority to act for the bank. He denied the several allegations of fact made in the plaint, and stated that the bank, having discovered after the day of the sale by auction that the description of the property contained in the conditions was erroneous, justly refused

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1895. *Jan. 31 and Feb. 8.* — WITHERS, J.

to purchase it; that he was authorized to buy the whole of the said house, as the conditions purported to sell, but that what was attempted to be sold was only four-fifths thereof.

At the trial it appeared that, upon the conclusion of the sale by auction, the following memorandum attested by a notary public was signed by the defendant and the auctioneers :—

At the sale by auction made this day of the property described in the annexed particulars (viz., the conditions of sale), the Bank of Madras, by R. L. M. Brown, was the highest bidder for, and was declared the purchaser of, the said property at the price of Rs. 25,050.

As witness our hand at Colombo this 16th day of November, 1891.

For the Bank of Madras, R. LEWIS M. BROWN.
FORBES & WALKER, Auctioneers.

The defendant admitted that he had no notarial deed from the bank authorizing him to bid for the premises.

On the 17th November the auctioneers called upon the Bank of Madras to pay them Rs. 6,563·99 in terms of the conditions of sale on account of the price, but the bank replied that it "did not "purchase any property at public auction on the 16th November, "and therefore cannot send you a cheque as requested."

Thereupon, in pursuance of the conditions of sale, the house was put up for sale again, after notice to the bank, and sold to a third party for Rs. 22,200.

The damages claimed by the plaintiffs represented the difference between the original price, Rs. 25,050, and the price recovered at the second sale, Rs. 22,200.

The Additional District Judge (Mr. Conolly) dismissed plaintiffs' case on the ground that they had not discharged the onus of proving that defendant had no authority from the bank to bid for and buy the premises.

They appealed.

Dornhorst, for appellants.

Dumbleton, for respondent.

8th February, 1895. WITHERS, J.—

This is an action to recover damages from the defendant on the ground that he induced the plaintiffs to contract for the sale of certain premises in Colombo with a local bank by a representation that he was the agent of the bank to conclude the said contract, when in fact he was not so.

I understand the defendant's answer to be that it is true that he was not authorized by the bank to purchase the premises referred to, but that he signed the contract in the belief as to a particular state of facts into which the plaintiffs had misled him.

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I assume, for the purpose of my judgment, that the plaintiffs have made out a *primâ facie* case of innocent misrepresentation of authority, by which they were induced to sign a contract of purchase and sale, which the defendant's principal, for some reason or another, refused to ratify.

Two facts with regard to this action are important to notice. In the first place, the action itself is one for damages. In the second place, the plaint does not pretend to suggest that the defendant's misrepresentation was made either with fraudulent intention or recklessly, and without care whether it was true or not. It merely says that he had not the authority which by his conduct he professed to have.

In these circumstances, is the defendant personally liable to the plaintiffs in damages?

Mr. Dornhorst argues that he is, and he cites the case which seems to me to be exactly in point, in support of his argument, namely, *Smout v. Ilbery*, reported in *10 M. and W., p. 1.* Baron Alderson, delivering the judgment of the Court of Exchequer, observed as follows:—"There is a third class in which the "Courts have held that, where a party making the contract as agent "*bonâ fide* believes that such authority is vested in him, but has in "fact no such authority, he is still personally liable. In these cases "it is true the agent is not actuated by any fraudulent motives; "nor has he made any statement which he knows to be untrue. "But still his liability depends on the same principles as before. "It is a wrong, different only in degree, but not in its essence, from "the former case, to state as true what the individual making such "statement does not know to be true, even though he does not "know it to be false, but believes, without sufficient grounds, that "the statement will ultimately turn out to be correct. And if that "wrong produces injury to a third person, who is wholly ignorant "of the grounds on which such belief of the supposed agent is "founded, and who has relied on the correctness of his assertion, "it is equally just that he who makes such assertion should be "personally liable for its consequences."

I venture to think that that statement of the law is no longer accurate in view of the opinions of the House of Lords in the well-known case of *Derry v. Peek.* In *Bishop v. Balkis Consold. Company (59 L. J., Q. B. 565)*, where the plaintiff had lost the price of the shares which he sought to recover from the company, by reason of a merely careless misrepresentation, it was held that no action would lie. Lord Justice Lindley delivered the judgment of the Court of Appeal in that case, and he made this observation:—"The plaintiff was induced, however, by the

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1895.
February 8.
BROWNE, A.J.

" 'certification' to part with his money, and he has lost it; and if " an action would lie for a careless misrepresentation, I should be " of opinion that the plaintiff could recover the money thus lost " from defendant, but no action lies for such a misrepresentation; " this was finally decided in *Derry v. Peek*, which it is not for me " to criticise."

In *Law v. Bouverie*, which was an action by an intending encumbrance against the trustee of a fund for loss sustained by his negligent misrepresentation with regard to certain encumbrances, the same Lord Justice in his judgment observed " that " until the case of *Derry v. Peek* was decided, it was generally " supposed to be settled in equity that liability was incurred by a " person who carelessly, although honestly, made a false represen- " tation to another about to deal in a matter of business upon the " fact of such representation. This general proposition is, however, " quite inconsistent with *Derry v. Peek*."

There are, I dare say, exceptions to this doctrine. I take it that if A is induced to contract with B on the face of an innocent misrepresentation, he would have some restitutive remedy against B, which would restore him what he had actually lost in consequence of entering into a contractual relation with B. So, I take it a person who is under a legal duty to tell the truth to another would have to answer for the consequence of an innocent misrepresentation under the belief of which that other acted. This defendant, however, entered into no contract with the plaintiffs, and was under no legal duty to them when he signed the conditions of sale as the agent of a local bank.

The conclusion I come to is that the plaint discloses no cause of action for damages against the defendant. If I am wrong in this view of the law, I certainly think defendant ought to have an opportunity given him to make good his defence.

Mr. Dumbleton urged that the representation complained of related to a matter of law, and was on that ground not actionable. That may be so where the representation relates to a pure matter of law, but that cannot be said, in my opinion, of the defendant's representation. For these reasons I would affirm the judgment of the Court below with costs.

BROWNE, J.—

I venture to concur entirely in the views expressed by my brother Withers. In effect the case of the defendant, in the view taken of his position by the rest of the Court, appears to be that contemplated as possible by Lord Herschell in *Derry v. Peek;* that of a man who may be blameworthy, as from having formed his

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belief carelessly or been unreasonably credulous—a position in which he would be in nowise liable for an action of deceit—and that, as my brother has pointed out, it might be open to the plaintiffs to obtain on some ground such relief as was necessary to them against the consequences of his act, but that (albeit this is not an action of deceit) it is not open to them to obtain the remedy of damages for which they here prayed.

At the same time, and with deference to the opinions expressed by the rest of the Court as to the position actually occupied or in his pleading assumed by the defendant, I would say I am not inclined to dissent from the views held by the learned District Judge, but would rather affirm his judgment from his own point of view. Granting that the signature of the agent amounted to an affirmative, that he had authority to do the particular act, have the plaintiffs discharged the onus on them and disproved that he had such authority ? They submit as their proofs (1) repudiation by the bank, his principals ; (2) his own statement in his answer ; and (3) the fact that he held no power of attorney under which he could alone act as agent of a corporation, a ground which was not at all suggested in the plaint. I concur in the holding that the repudiation in the letter by the proctors for the bank, who merely wrote that "the bank did not purchase any property at "public auction on the 16th instant," is not conclusive proof that defendant had no authority to make the one bid there, the only bid made on their behalf. Behind, and as ground for, such a denial, there may have been intended in any possible action a defence of such want of *consensus ad idem* as was argued before us, or misrepresentation as pleaded, or other matter apart altogether from a denial that defendant acted without their authority in what he did do and sign in their name. As to the second proof, we know nothing of the facts of any authorization, however imperfect. The plaintiffs abstained from an investigation thereof by examination of the defendant's principals or their manager in Colombo. I conceive it to be possible that the corporation, by their authorized manager, seeing an advertisement of intended sale of "all that house No. 5, Baillie street, occupied by S," either satisfied themselves by inspection of deeds, &c., as to the subject-matter of sale, or else were content from the names of the vendors and brokers subscribed to the advertisement to believe what would be sold, and so simply sent the defendant to be their mouthpiece in bidding at the sale of this single lot without casting on him any duty of inspection of deeds or verification of parcels, and that they were prepared to acknowledge and ratify all his acts for them until, as he has pleaded, *they* (and not he), subsequent to the

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1895. *February 8.*

BROWNE, A.J.

sale, discovered material error of description. In any action against them, I would be quite prepared to find them acknowledging the agency and defending themselves upon that misdescription alone. The defendant's plea, which has been read in evidence against himself, is not happily framed, and in the want of averment of the plaintiffs' responsibility for the advertisement might even fail as ground of defence. But in it he has asserted he had the authority of his principals to bid for the house advertised, and that he *bonâ fide* did so; and if his pleader has gone beyond those assertions, and taking into consideration quite unnecessarily the subsequent discovery and its relation back to his own acts at the sale, has indicated what would be the defence of his principals in any contest between the vendors and them, I would not wrest the statements made for such purpose into an admission of neglect in or carelessness of inquiry by defendant himself, which I consider would be necessary to constitute an admission that he had done an act which he was not authorized to do. I would regard this defence as one that under the mistake averred the authority was given, accepted, and acted upon, and that it continued of force until the mistake was discovered, and so that the defendant always had authority. And in the absence of acknowledgment or proof of special duty of inquiring, &c., imposed on him, I would also regard this defence as possibly sustained.

As to the third proof, that defendant had no power of attorney under the seal of the corporation, it may be, as Mr. Dumbleton has contended, that this was the sole proof on which plaintiffs at the trial relied. The record does not read so to me, seeing that it was advanced at the trial only after the learned District Judge had, at least, doubted the sufficiency of the other proofs. But if it were so, I am not at all clear how far the plaintiffs would be entitled to rely thereon when they offer as proof only that defendant signed the conditions of sale, and not that their notary or they then inquired as to whether defendant was so authorized, or that defendant made any representation thereof. It has not been proved by the plaintiffs what powers this corporation under any charter from which it may derive its existence may or may not have, as to the appointment of an agent to bid at a land sale or conduct preliminary negotiations for any transaction such as this outside the lines of its banking business proper. The matter may be open to discussion (*Story on Agency, section 52*).

In this view, that the plaintiffs have not established that in all he did the defendant had not the authority of his principals, the conclusion expressed by my brother is the more acceptable to me.

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LAWRIE, A.C.J.—

The plaintiffs aver that the defendant, Mr. Brown, assumed to be the agent of the Bank of Madras; that he pretended to have full authority to act for the bank; that he did by his acts assert and warrant to the plaintiffs that he was authorized by the bank to be such agent to bid, &c.; but that the defendant was not authorized by the bank to bid at the sale, nor to subscribe its name to the conditions of sale, &c.

There is in the plaint no averment of fraud or deceit. The action seems to me to be one founded on the doctrine "that a "person professing to contract as agent for another, impliedly, "if not expressly, warrants or promises to the person who enters "into such contract upon the faith of such profession, that the "authority which he professes to have does in fact exist." I venture to doubt whether the law applicable to such a case has been affected by the judgment of the House of Lords in *Derry v. Peek*, and by the later cases *Bishop v. Balkis Consol. Company* and *Law v. Bouverie.*

In the leading case, *Derry v. Peek*, the plaintiff laid his action on deceit; he averred fraud. Here, the cause of action is not fraud, but the breach of a warranty; and in my humble opinion, the plaintiffs need not aver nor prove deceit or fraud, and the defendant is liable in the damages caused by his representation that he was agent, if that representation was not correct.

As I read the answer, the defendant admits that he had no authority from the bank to bid for the house described in the conditions of sale; he had no authority from the bank to subscribe its name on these conditions of sale.

The plaintiffs thus, in my opinion, made a good *primâ facie* case for damages against the defendant. I cannot say that I am satisfied that the plaintiffs, either in the plaint or at the trial, showed that they had sustained damage beyond the expenses of the day of sale, expenses which were useless and which had to be incurred anew in consequence of the sale to the plaintiff falling through.

While the plaintiffs made out a *primâ facie* case against the defendant, there are in the answer averments which, if proved, would exonerate the defendant. He avers, as I understand, that he acted as the agent of the bank in this matter, induced by a mistake in fact caused partly, if not wholly, by the acts of the plaintiffs themselves; that he had read in the local newspapers a description of the extent of the premises which the plaintiff said they were about to sell; that that advertisement did not describe the premises correctly: the house which the plaintiffs owned and

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1895. February 8.

LAWRIE, A.C.J.

which they described in the conditions of sale was a smaller and less valuable house than the advertisement had described. The bank had authorized the defendant to buy the larger house, it had not authorized him to buy the smaller house, and his mistake in bidding for the latter was caused by the advertisement for which the plaintiffs were responsible.

The rest of the Court are against this view. I can only say that as the trial in the District Court was hasty and incomplete, and as the judge who presided is no longer in the Colony, I would have liked to have set aside this decree and to have sent the action to the District Court for new trial on issues to be carefully framed, and I would have left the costs to depend on the final result.

1895. January 20.

MENIKHAMI GAMARALA *et al.* *v.* THE CROWN.

D. C., Chilaw, 256 B.

Forest Ordinance, 1885—Amending Ordinance No. 1 of 1892, s. 9, subsection 6—Appeal from decision of Forest Settlement Officer—Procedure as to lodging appeal and time for supplying stamp for judgment in appeal—Civil Procedure Code, s. 756—Ordinance No. 3 of 1891.

Per BURNSIDE, C.J., and WITHERS, J. (*dissentiente* LAWRIE, J.).—All that is required of a party appellant under section 9 of the Ordinance No. 1 of 1892 is to lodge with the forest officer, within three weeks of the order appealed from, a duly stamped petition of appeal and affidavit to enable him to have his appeal dealt with by the Supreme Court.

It is not necessary for the appellant to deliver, as provided in the Ordinance No. 3 of 1890, in the case of appeals from District Courts and Courts of Requests, a proper stamp for the decree or order of the Supreme Court.

But counsel for appellant should, before argument, undertake to supply the proper stamps for the judgment in appeal.

THIS was an appeal from a decision of a Forest Settlement Officer in favour of the Crown.

The claimant appealed, without supplying a proper stamp for the decree of the Supreme Court.

20th January, 1893. *Rámanáthan*, *S.-G.*, for the Crown, submitted that the appeal was inadmissible without such stamp.

Seneviratana, for the appellant, was heard *contra*.

Cur. adv. vult.

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24th January, 1893. BURNSIDE, C.J.— 1893. *January 24.* BURNSIDE, C.J.

The decision of points growing out of the Forests Settlements Ordinances is not usually an easy task. The Ordinances themselves are novel in principle and abound in paradoxes, but the question for our decision in the present case is, in my opinion, free from doubt. It arises upon section 9 of the Forest Ordinance, No. 1 of 1892, which, after giving a right of appeal to this Court to any person dissatisfied with a decision of a forest officer by lodging a petition of appeal with an affidavit, of the nature of the right affected with that officer, goes on by sub-section (c) to enact :— "Stamp duty shall be charged upon every such petition of appeal and "upon every such affidavit, at the rates specified in part II. "of the schedule B to 'The Stamp Ordinance, 1890,' for similar "instruments in the District Courts, and upon subsequent proceed-"ings at the rates specified in the said schedule for appeals from "the District Courts; and every such appeal shall be dealt with "and disposed of in the same manner and subject to the same "rules as appeals from District Courts are dealt with and disposed "of." It was contended by the Solicitor-General that the provision to the Stamp Act which relates to the time when the stamps necessary for judgments in appeal shall be supplied, governs appeals in these cases. The provision is as follows :—

"Provided also, that in appeals to the Supreme Court the "appellant shall deliver to the secretary of the District Court or "clerk of the Court of Requests, together with his petition of "appeal, the proper stamp for the decree or order of the Supreme "Court and certificate in appeal which may be required for such "appeal."

Whilst I am of opinion that a judgment in appeal is a "subse-"quent proceeding" within the sub-section of the Forest Ordinance, I am clearly of opinion that the provision just quoted does not apply to it. In the first place, by the Forest Ordinance it is clear that it is the stamp "rates" only which are made to apply to "subsequent proceedings," and the provision to the Stamp Ordinance does not refer in any way to the "rates" to be paid, but it refers especially and only to the "time when" such rates are to be paid. Then, again, to hold that the provision applied to proceedings like the judgment in this case would be in effect to make the Legislature give a right of appeal in one breath and take it away in the next, for it would be impossible for an intending appellant to comply with the requirements of the provision. Which would be the District Court or the Court of Requests, to the secretary of which the stamps are to be delivered? It was

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1893. *January 24.* — LAWRIE, J.

suggested that the forest officer, or the registrar of this Court, would be officers corresponding to the secretary of the lower Court. But which would really be so? The very alternative is sufficient to dispose of that suggestion, which would in itself be simply legislating, and not construe legislation as we are called to do.

I cannot appreciate the reasoning that because this Court has already held with respect to the provision, that it creates a condition precedent to the right of appeal in those cases to which the Legislature has in unmistakable terms applied it, therefore we must also apply it to other cases in which the Legislature has been silent with regard to it, and with the effect of defeating a right of appeal which has been also unmistakably conceded.

As I have said, I think the judgment would be a "subsequent "proceeding," and it should therefore be stamped in the words of the Ordinance "at the rates specified in the schedule for appeals "from the District Court," but as the Ordinance has made no special provision as to the time when such stamp shall take place the general law must apply, and the judgment would strictly and properly be stamped at the time when other judgments are really stamped. I fully recognize, however, the inconvenience, if no greater evil, of leaving a judgment to be stamped after it shall have been delivered, without any provision for securing the supply of the proper stamp, and although the Legislature has been silent on that matter, it has by sub-section (*b*) of the same section of the Ordinance given this Court full power to obviate the inconvenience by empowering the Court, after the appeal has been forwarded to our Court, "to make such order as the justice of the case may "require." I am prepared, therefore, to permit this case to be heard in appeal, upon the undertaking of counsel that the proper stamps for the judgment in appeal shall be supplied; and in all future cases the order will be that no appeal will be received until a similar undertaking is given by counsel.

LAWRIE, J.—

The 9th section (sub-section 6) of the Ordinance No. 1 of 1892 provides that the rates of stamp duties specified in the schedule for appeals from the District Courts shall be charged on proceedings subsequent to the petition of appeal for appeals from a decision or order of a Forest Settlement Officer, and that such appeals shall be dealt with and disposed of in the same manner, and subject to the same rules as appeals from District Courts are dealt with and disposed of.

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The judgment of this Court in appeal is of necessity a proceeding subsequent to the petition of appeal. The section I have quoted, in my opinion, requires that that judgment shall bear the same stamp as it would bear if it were a judgment in appeal from a decision of a District Court. The appellants have not up to this moment supplied any stamps for the judgment in appeal. In my opinion, we must deal with the omission as if this case were an appeal from a District Court. If an appellant from a District Court judgment omitted to furnish stamps for the judgment of this Court, we would reject the appeal. I am of opinion that no other course is now open to us. I would reject the appeal.

WITHERS, J.—

To my mind there is little doubt that all that is required of a party appellant under the 9th section of Ordinance No. 1 of 1892 is to lodge with the forest officer within three weeks of the order appealed from, a duly stamped petition of appeal and affidavit to entitle him to have his appeal dealt with by this Court as appeals from the District Courts are dealt with.

The provisions of the 756th section of the Civil Procedure Code cannot be worked into section 9 of Ordinance No. 1 of 1892, for this relates only to what shall occur after the transmission of the proceedings to this Court.

Then, as to the provision of the Stamp Ordinance which anticipates the usual time for stamping instruments by requiring the proper stamp for the judgment of this Court to be delivered with the petition of appeal to the secretary of the District Court, I cannot find the language which incorporates it into the 9th section of Ordinance No. 1 of 1892, which, in regard to proceedings like this judgment, subsequent to the receipt of the case by our Registrar, declares only the rates of duty to be imposed on them, and no more.

It is left to us, as pointed out by my Lord, to make such order in matters incidental to proceedings in appeal under this Ordinance as the justice of the case may require, and I venture to think the order proposed a just application of a very ordinary requirement.

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1893.
February 14.

DONA MARIA *v.* DON PAULES DE SILVA.

D. C., Colombo, 715.

Husband and wife—Marriage in community—Death of husband—Right of widow to one-half of the property held in community—Necessity of administering whole estate.

Per BURNSIDE, C.J. (LAWRIE, J., dissenting).—Though by the Roman-Dutch Law the surviving wife acquires a right to one-half of the property held in community during the marriage, yet convenience and the necessity of avoiding multiplicity of suits demand that the whole estate of the deceased should, in the first instance, vest in the administratrix for disposal among the persons legally entitled to specific shares therein.

THE facts of the case are as follows: Eusebias Perera and Dona Maria having been married in community in 1866, the former took on lease on the 23rd March, 1882, an undivided half share of an allotment of land containing plumbago pits from one Tikira, who was entitled to that share, while the other half belonged to the defendant. The lease was to take effect from the 17th January, 1885, and was to run for eight years from that date. Eusebias Perera died on 16th December, 1884, and his widow, Dona Maria, took administration to the whole of the estate on 3rd September, 1885, and raised the present action praying (1) that she be declared entitled to a moiety of the value of the net produce of plumbago won and appropriated by the defendant from the pits on the land from the 17th January, 1885, to the institution of the plaint (21st January, 1891); (2) for an account of the plumbago dug out and quarried from the said pits, and of all expenditure in respect thereof; and (3) for interest and costs.

In his answer, the defendant pleaded *inter alia* that on the death of the plaintiff's husband one-half of his leasehold (which was an undivided half share) vested in her as his widow, and the other half on their children, and that the grant of administration to the plaintiff was in respect of the children's half only. inasmuch as the plaintiff's half had already vested in her on the death of her husband, when the community of property was determined; that plaintiff therefore, as administratrix, could only call upon the defendant to account for one-fourth of the net proceeds of the plumbago, and not for one-half as in the plaint set forth.

The learned District Judge (Mr. Owen Morgan) overruled the defendant's objection in the following judgment:—

"The question is whether the plaintiff, in taking out admini-
"tration to her deceased husband's estate, was bound to deal with
"the *whole* of the estate or only *half*. It is clear that on the death

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" of plaintiff's husband the community of property ceased, and half " the estate devolved by operation of law on the plaintiff, as the " deceased's widow. But it is to be noted that the whole estate is " liable for the debts contracted during the subsistence of the com-" munity, and if administration is not taken to the whole estate, it " would be impossible to pay and satisfy such debts from the " whole estate.

" The children are entitled, without any distinction, to a share " equal to that of the widow's, and if administration is taken to " only one-half of the estate, all the debts contracted during the " marriage will have to be paid out of the children's share, and " that share will be greatly diminished.

" Again, it is difficult to divide the estate and allot one-half to " the widow till the value of the whole estate is ascertained. This " can only be done after payment of all the debts due by the estate, " and the recovery of all moneys and other property from the " debtors of the estate.

" I am of opinion, that though one-half of the estate devolved " on the widow on the death of her husband, yet that that half " cannot be divided or separated and given to the widow till the " whole estate is administered.

" The objection raised by the defendant is over-ruled with " costs."

The defendant appealed.

Layard, A.-G., with *Wendt*, for appellant.

Dornhorst, with *De Saram*, for respondent.

14th February, 1893. Burnside, C.J.—

In my opinion the judgment of the learned District Judge of Colombo is eminently sound, and should be affirmed. Undoubtedly by the Roman-Dutch Law the surviving wife acquired a right to one-half of the property held in community during the marriage, but this general proposition is materially qualified by the fact that the surviving wife's estate thus acquired is liable in all respects to the payments of the debts of the husband, as is the husband's half of it; and also there was this further qualification that, in case the property was naturally indivisible, it would be to the value only of such property to which the widow's right extended. We have already held that the right of the executor to the immovable property of the deceased is, for the purpose of administration, co-extensive with his right to personal property for the payment of debts. The Roman-Dutch Law, as a mere matter of procedure, rendered the wife liable to be sued in respect of the liability of her share of the intestate estate. Our

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1893. February 14. — Lawrie, J.

statute law has engrafted on the Roman-Dutch Law the law of administration, providing for the appointment of administrators for the purpose of securing a responsible person liable at law for the due disposal of intestates' estates, both among creditors and next of kin; and it seems to me that we are only walking abreast with the law as it now exists, in holding that the whole estate of the deceased should, in the first instance, vest in the administrator for disposal among the persons legally entitled to individual shares of it. It certainly would be a gross anomaly if the administrator, although subject to be sued for the deceased's debts, could not realize the property liable for them. Looking at the decision *primæ impressionis*, its convenience, the avoidance of multiplicity of suits and divided administration, which the English law abhors, I cannot doubt that the ruling of the District Judge is sound, and should be accepted.

This very case proves the soundness of the position. The widow is always preferred in granting administration, and if the contention of the defendant were allowed to prevail, the property of her intestate would be subjected to the expense of several suits by and against the same individual in different capacities—the wife as surviving spouse and the wife as administratrix. This alone would seem to be a good reason to reject the defendant's contention. It is not therefore necessary to refer to the contention of the plaintiff that, even if the defendant's objection were well founded, it would only be matter of misjoinder to be rectified by amendment.

The judgment is affirmed with costs in both Courts.

Lawrie, J.—

I would sustain the order in the special circumstances of the case.

The plaintiff obtained administration of the intestate estate of her deceased husband, Eusebias Perera. I understand that it was stated by the widow, in the affidavit of the extent and value of the estate, and in the appraisement and in the inventory, that the deceased was the sole lessee under a lease which did not commence until some months after his death. It is by no means certain that this lease in favour of a man and his heirs, executors, administrators, and assigns, of which he had no enjoyment or possession during his life, fell under the community. His widow has not chosen to claim any rights under it, and in the absence of any other claim it seems to me that the right of the administratrix of the lessee to administer it is undoubted. I dissent from the general proposition that the administrator of a deceased

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spouse who was married in community (the other spouse surviving) has right to administer the whole estate which was in communion. On the death of either spouse the other has right to half of the property lately the subject of the marriage community. All that the heirs or legatees of the deceased have right to is the one-half to which the deceased was entitled. The executor of one spouse cannot realize the whole property of the purpose of paying legacies or for distribution among the heirs of the deceased; and if an executor cannot do so, neither can an administrator.

1893. *February 14.* LAWRIE, J.

In my opinion, it is well-fixed law that the administrator or executor can administer and realize only such estate as the deceased had testing powers over. Here, however, we have to deal with an estate which was not in possession of the spouses at the date of the death, an estate which the surviving spouse who has taken out administration has been content to treat as the exclusive property of her deceased husband. I shall not decide that the widow has right to half when she herself does not claim it. I regard her dealing with the interest created by the lease as practically a renunciation of any right which she had or might have claimed in it, because she has deliberately chosen to treat it as her husband's property.

I see no reason to disturb the order.

Affirmed.

DELMEGE *et al.* *v.* DELMEGE.

1895. *Dec. 13 and 14, and Jan. 3, 1896.*

D. C., Colombo, C 4,988.

Civil Procedure Code, s. 781—Application for certificate as to fulfilment of requirements of s. 42 of the Courts Ordinance—Plaint for injunction and damages—Value of subject-matter in issue.

Where, in an action raised to restrain the defendant from trading under a certain name and to recover Rs. 9,000 as damages consequent upon the use of such name, no value was assigned in the plaint to the use of such name, and no issue relating to damages was framed, nor any attempt made to prove damage at the trial, and the dismissal of plaintiffs' case was affirmed by the Supreme Court—

Held that, under section 42 of the Courts Ordinance, the value of the subject-matter of the suit was to be determined by the statement in the plaint, whether proved or not, and that a party desiring to appeal to Her Majesty in Her Privy Council was entitled to the certificate referred to in section 781 of the Civil Procedure Code.

THIS action was raised to restrain the defendant from trading under the name and style of Delmege, Reid & Co., and to recover Rs. 9,000 as damages. No value was placed on the right to use the name. The District Judge refused the injunction and dismissed the plaintiffs' case, as no damages were proved.

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1895.
Dec. 13 and 14, and Jan. 3, 1896.

BONSER, C.J.

On appeal, this judgment was affirmed by the Supreme Court, and now the plaintiffs, preparatory to an appeal to the Privy Council, applied to the Supreme Court for a certificate under section 781 of the Civil Procedure Code, that as regards amount, value, and nature the case fulfilled the requirements of section 42 of the Courts Ordinance.

Layard, A.-G. (with him *Dornhorst* and *Loos*), appeared in support of the motion, and cited D. C. Colombo, 2,298 (*Hadjiar v. Pitchey*), in which the Privy Council gave leave to appeal, on the footing that the value of the subject-matter of the suit was to be determined by the statement in the plaint.

Dumbleton (with him *Van Langenberg* and *De Saram*), for defendants. *Cur. adv. vult.*

3rd January, 1896. BONSER, C.J.—

This is an application for a certificate under section 781 of the Civil Procedure Code by plaintiffs, whose action has been dismissed by the District Court and by this Court, and who wish to have the case heard in review by the Full Court. My brother Lawrie, to whom the application was first made, having some doubt as to the propriety of granting the certificate, has referred it to this Court. The certificate which is asked for is one "either "that as regards amount, value, and nature, the case fulfils the "requirements of section 42 of the Courts Ordinance, 1889, or that "it is otherwise a fit one for appeal to Her Majesty in Council." The petitioner does not attempt to make out that the case comes within the second alternative, but alleges that it satisfies the requirements of section 42 of the Courts Ordinance. These are, that the judgment appealed from "shall be given or pronounced "for or in respect of a sum or matter at issue above the amount or "value of Rs. 5,000, or shall involve directly or indirectly the title to "property or to some civil right exceeding the value of Rs. 5,000." The plaintiffs and defendant were formerly carrying on business together in partnership, under partnership articles, which partnership determined by effluxion of time. The defendant thereupon commenced business on his own account under the old partnership name. The plaintiffs allege in their plaint that this was a wrongful act on his part, and that they have suffered damage thereby to the amount of Rs. 9,000, and they claim (1) an injunction to restrain the defendant from the use of the old name, and (2) Rs. 9,000 as damages. No value was placed upon the right to use the name as required by section 40 of the Civil Procedure Code, so that the only question for us to decide is whether or not the judgment was given or pronounced for or in respect of a sum at issue above the amount of Rs. 5,000.

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The history of the case is shortly this. The plaintiffs applied for and obtained an *interim* injunction till the trial. On appeal to this Court, the injunction was dissolved. The case then came on for trial in the District Court. At the trial no evidence was adduced. The plaintiffs' counsel merely stated that his grounds were the same as those argued before the District Court and the Supreme Court on the question of the *interim* injunction, and that " the Court can decide on our claim."

The Court did not, as it ought to have done, under our procedure, frame any issues (see section 146 of the Civil Procedure Code). But I think it may be taken that the issue which the plaintiffs submitted to the Court was whether or not the plaint disclosed a cause of action, and I think that this was the only issue which, speaking strictly, was before the Court at the trial. The question of damages was not raised at the trial, nor was any evidence adduced in respect of it. Judgment was given dismissing the action on the ground that the plaint disclosed no cause of action, and this judgment was affirmed by this Court in appeal. It is that judgment of this Court that the petitioners seek to bring under review. Although, strictly speaking, the question of damage was never at issue, for no issue respecting it was framed and recorded, yet I think that the judgment was one " given in respect of the claim " for damages," for plaintiffs are by that judgment altogether shut out from recovering any sum by way of damages, and that the question of damages was substantially at issue between the parties. The only doubt which I felt was whether we were justified in certifying that the amount at issue was above Rs. 5,000, there being no evidence whatever before us as to the amount of damages, or indeed that any damages at all have been sustained by the plaintiff. We have been referred, however, to a recent case of *Hadjiar v. Pitchey*, where the Privy Council gave leave to appeal, as of right it would seem, and not of grace, although this Court had refused such leave. In that case, the action was to recover land stated in the claim to be worth Rs. 4,050, and mesne profits at a rate which would make up the claim to over Rs. 5,000. I have referred to the record, and find that there was no evidence before this Court as to the value of the land, or of the mesne profits, and, therefore so far as this Court had any judicial knowledge, their value might have been nil. This Court refused leave to appeal on the ground that, as regards value, they had only the speculative estimate of the plaintiff in his plaint. The Privy Council gave leave to appeal without assigning any reason, but I gather that their Lordships acceded to the argument of the appellant's counsel that, for the purpose of giving leave to appeal,

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1896. January 3. — LAWRIE, J.

the value of the subject-matter of the suit is to be determined by the statement in the plaint without more. This seems decisive of the present application, which accordingly is granted.

LAWRIE, J.—

On the authority of the allowance by the Privy Council of the appeal in D. C., Colombo, 2,298, I am of opinion that the certificate may be granted.

1895. October 18.

JANSEN *v.* ARNOLIS.

P. C., Colombo, 4,042.

(Itinerating Police Magistrate, Western Province.)

Criminal Procedure Code, ss. 229 and 403—Ordinance No. 22 of 1890, repealing Chapter XIX. of Criminal Procedure Code—Right of appeal where accused has pleaded guilty—Mode of recording admission of offence by accused—Criminal Procedure Code, s. 220—"Additional Police Court"—status and powers of Magistrates of one Court sitting apart from each other—Ordinance No. 1 of 1889, ss. 55, 56, 57—Exercise of wise discretion in entertaining complaints.

Since the repeal of section 229 of the Criminal Procedure Code, section 403 has become inapplicable to the procedure provided by section 220 of the amending Ordinance No. 22 of 1890, and now there is no statutory bar to an appeal by an accused person who has been convicted in a Police Court summarily upon his own admission of guilt.

The terms of section 220, as regards the mode of recording the admission of the accused, must be strictly complied with. It is not enough to record that "he pleaded guilty to the charge," but the exact words used by him should be set forth.

Ordinance No. 1 of 1889, sections 55, 56, and 57, does not admit of any such Court as "the Additional Police Court of — ——," as if each of the several Magistrates whom the Governor may appoint to a Court constituted a distinct and independent Court.

The proceedings before each such Magistrate should be intituled "In the Police Court of ——— (naming the division), holden at ———, before ———, one of the Magistrates of the said Court."

There is no objection to one Magistrate of a Court entertaining a complaint and issuing process to compel the attendance of an accused person before a Police Court, and the inquiry or trial being undertaken by another Magistrate of the same Court; nor is it objectionable for one Magistrate to admit to bail a person who has been dealt with by another Magistrate of the same Court, or to perform a purely ministerial act like the communicating to an accused the order of the Supreme Court in appeal, and to give effect to such order.

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But where one Magistrate has commenced to hear a case, he must continue it to the end, unless it falls within section 89 of the Ordinance No. 1 of 1889. 1895. *October 18.*

Observations on the exercise of wise discretion in entertaining plaints. BONSER, C.J.

THE facts of this case appear fully in the judgment of the Chief Justice.

Bawa, appeared for the accused appellant.

Layard, A.-G., was heard as *amicus curiæ*.

18th October, 1895. BONSER, C.J.—

In this case the charge against a man named Arnolis was that, being the occupier of a house, he kept the same as a common gaming-place, in breach of section 5 of Ordinance No. 17 of 1889. The record states that he was brought up and the particulars of the offence explained to him, and it is then recorded that "he "pleaded guilty to the charge," and on that plea he was convicted. The case comes up before us in revision, for an appeal which was lodged was rejected by the Magistrate, apparently because of section 403 of the Criminal Procedure Code, which provides that "when an accused person has pleaded guilty and been convicted "by a District or Police Court on such a plea, there shall be no "appeal." In the Code, as it was passed originally, there was a section, which was numbered 229, which provided that, after the charge had been read and explained to the accused, he should be asked whether he was guilty, or had any defence to make; and if he pleaded guilty the Magistrate was to record the plea, and might in his discretion convict him thereon. But that question was not a question to be asked at the commencement of the proceedings. It was a question which was to be asked after the evidence had been taken for the prosecution, and the Magistrate was of opinion that there was ground for presuming that the accused had committed an offence which the Court was competent to try. At that stage of the proceedings the Magistrate was to frame a formal charge, and it was after that formal charge had been read and explained to him that the accused was to be asked if he pleaded guilty to the charge, or wished to make any defence. In 1890 the Code was amended, and section 229 was repealed, together with other sections dealing with summary trials, and the chapter relating to summary trials was re-drafted. But in the new version the procedure to which I have referred as contained in section 229 found no place. Section 220 of the amending Ordinance provides, as did the Code previously, that at the commencement of the proceedings in a case summarily

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1895. *October 18.*

BONSER, C.J.

triable the accused is to be asked if he has any cause to show why he should not be convicted. If he admits that he has committed the offence of which he is accused, his admission must be recorded as nearly as possible in the words used by him, and if he does not show sufficient cause why he should not be convicted, the Magistrate is to convict him. Section 403 is therefore inapplicable to the present procedure, now that the plea of guilty has been abolished, and it might just as well have been expressly repealed, as it has been impliedly, as far as Police Courts are concerned. It would no doubt have been expressly repealed had not the matter escaped the attention of the Legislature. The result is that now there is no statutory bar to an appeal by an accused person who has been convicted in a Police Court summarily on his own admission of guilt.

In this case it is to be observed that the Police Magistrate has not followed the direction given in section 220 of the Code. He has not recorded, as nearly as possible, the words used by the accused. As we have pointed out in several cases recently, that procedure is one that must be strictly complied with. The Magistrate has placed his own interpretation on what the accused said. The accused has a right to ask this Court to decide whether the interpretation placed by the Magistrate on his statement is a correct interpretation, and it is our duty to decide whether the Magistrate has correctly interpreted what the accused said. We cannot perform that duty unless we have the words as nearly as possible used by the accused. We must therefore quash this conviction. It is especially necessary, in a case like this, that the exact words used by the accused should be recorded. The offence of keeping a common gaming-house is a statutory offence, which is created by an Ordinance, the details of which are by no means easy to be understood, and we ought to be satisfied that the nature of this offence was clearly explained to the accused, and that he understood what the offence was of which he was charged. It is not sufficient to constitute the offence of keeping a common gaming-house, that the man should be the occupier or owner of the house, and that unlawful gaming should have gone on in that house; there are other elements required to complete the offence. So much for the merits of the case.

There are other circumstances in the case which call for our notice. The proceedings are intituled as having taken place in "the Additional Police Court of Colombo." Now, so far as we can ascertain—and we have had the advantage of the Attorney-General's assistance in the matter—there is no such Court as "the Additional Police Court of Colombo." Ordinance No. 1 of

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1889, section 55, provides that "the Governor may establish in "every division of the Island one court to be called the Police "Court, and each court shall be holden by and before one person, "to be called the Police Magistrate, at such convenient place or "places within such division as the Governor may from time to "time appoint." Then section 56 provides for the case where the work in a division may be too much for one Police Magistrate, and it empowers the Governor to appoint more than one Police Magistrate to the same Police Court, and section 57 gives them power to sit apart, but whether one or a dozen Magistrates are appointed they are Magistrates of one and the same Police Court. That being so, the proceedings should be intituled "In the Police Court of ——— (naming the division), holden at ———, before ———, one of the Magistrates of the said Court." There is nothing in the Ordinance to countenance the idea which appears to prevail that each Magistrate forms a distinct and independent Court. The position of Magistrates sitting apart in the same division is analogous to that of Judges of this Court when they, as frequently happens, sit apart.

In the present case that idea has given rise to hardship to this accused, of which he has a right to complain. The offence was alleged to have been committed in Colombo. He was tried in Colombo before a gentleman who has been appointed as an Additional Police Magistrate of Colombo, and was convicted. He appealed against that conviction, and this Court quashed the conviction and ordered the accused to be discharged. The accused was undergoing his sentence in the Colombo jail. Instead of that order being carried out by the Magistrate who happened at the time to be sitting in the Police Court of Colombo, it was thought necessary that the decision of the Court should be communicated to the accused and his discharge effected by the Magistrate in person who had convicted him. That Magistrate happened to be holding his Court at a place many miles from Colombo, called Henaratgoda. The order of this Court seems to have been sent to him there, whereupon he ordered the accused to be brought up before him from Colombo, and he discharged him at Henaratgoda.

I understand that, in acting as he did, the Magistrate acted in accordance with what he believed to be the law laid down by this Court, and we were referred to a decision by Mr. Justice Clarence, then acting as Chief Justice, sitting alone, in an appeal from a Magistrate's Court, from which it would appear that he was of opinion that the Additional Police Magistrate had an entirely distinct jurisdiction from the

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1895. October 18.

Bonser, C.J.

permanent Police Magistrate of the division, according to the report in *1 C. L. R., p. 14*. In that case the Magistrate, after commencing the proceedings, transferred them to the Additional Police Magistrate. The learned Judge is reported to have said that, as far as he understood the position of the two Magistrates, it would seem that this was not a case in which the Additional Police Magistrate had joint jurisdiction, but rather a case of transfer from one Magistrate to another, and he appears to have treated it as a case of transfer, which only the Supreme Court could order to be made. No doubt, if one Magistrate of a Court has commenced to hear a case he must continue it to the end, unless it falls within the provisions of section 89 of Ordinance No. 1 of 1889. This decision, however, has not been followed by all the Judges of this Court, for recently in a case before my brother Withers, he held that where an information had been laid before one Magistrate, it was no objection to the conviction that the trial had been held before another Magistrate, and it seems to me that that was a sound view of the law. I can see no objection to one Magistrate of a Court entertaining a complaint and issuing process to compel the attendance of an accused person before a Police Court for the purpose of inquiry whether he has committed an offence which ought to be tried by a Superior Court, or for the purpose of his being summarily tried, as the case may be, and the inquiry or trial being undertaken by another Magistrate of the same Court: nor can I see any objection to one Magistrate admitting to bail a person who has been dealt with by another Magistrate of the same Court, or performing such a purely ministerial act as communicating to an accused person the order of the Court of Appeal, and giving effect to that order by discharging him. That is no interference with the principle that must be maintained, that where one Judge or Magistrate has undertaken judicial duties with regard to any case, the exercise of those judicial duties must not be interfered with by any other Judge or Magistrate of the same Court. I am glad to believe that our decision will facilitate the work of Magistrates by removing what has been felt to be an impediment in the ready discharge of their duties.

There was another matter of which the accused complained in this case. When he was discharged at Henaratgoda it happened by some mysterious chance that a police officer was ready there to re-charge him with the same offence from which he had just been discharged. The Magistrate entertained the complaint on the spot, and fixed a day, four days later on, for the hearing of the case in Colombo, and in the meantime ordered the accused to

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find bail. Of course the accused could not be expected to find bail so far away from home, and the result was that he was sent back to jail. Although the Police Magistrate had jurisdiction to entertain the complaint, and therefore there was nothing illegal in his doing so, yet I think that he did not exercise his discretion wisely in entertaining the complaint at Henaratgoda. It was not such a complaint as required the immediate exercise of a Magistrate's powers. The complainant might very well have been referred to the Police Court held at Colombo. In all these cases the Magistrate must exercise his discretion. A murder case, for instance, would require immediate action, and a Magistrate would rightly use his discretion in entertaining the complaint and issuing process thereon, wherever he might happen to be. We do not wish to fetter in any way the discretion of Police Magistrates, but we call their attention to the fact that such an exercise of their discretion as was made in the present case entailed unnecessary hardship on the accused.

WITHERS, J.—

I entirely concur. If in my judgment, to which the Attorney-General has referred, I used language calculated to convey the opinion that the appointment of an Additional Magistrate to a Police Court constitutes a new and separate Court within the appointee's exclusive jurisdiction, I can only regret that. Henceforth, however, there can be no mistake.

THE QUEEN *v.* ANISU LEBBE *et al.*

1895.
October 11.

D. C., Batticaloa (Criminal), 2,056.

Criminal procedure—Questions and answers under s. 16 of Ordinance No. 1 of 1888—Criminal Procedure Code, s. 473.

Questions put to an accused by a Police Magistrate at a non-summary inquiry, and answers elicited from him under section 16 of Ordinance No. 1 of 1888, cannot, without proper proof, be read in evidence at the trial. If it is sought to put such questions and answers in evidence, they must be proved by some person who was present at the inquiry and heard them.

The irregular receiption of such questions and answers in evidence is fatal to a conviction, it being impossible to say what effect this improperly recorded evidence may have had on the Judge's mind.

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1895.
October 11.
——
BONSER, C.J.

The object of the provision in section 16 of Ordinance No. 1 of 1888 is to call the attention of the accused to the various points which have been proved against him, so that he may have an opportunity of explaining them, and that they may not remain unexplained in consequence of forgetfulness on the part of the accused, or ignorance of their bearing and effect.

THE facts of the case sufficiently appear in the judgment.

Pereira, for accused, appellant. At the close of the case for the prosecution, the statement of the accused in the Police Court, and certain questions and answers recorded by the Police Magistrate under section 16 of Ordinance No. 1 of 1888, were received in evidence. The reception in this way of the questions and answers was irregular. There is no provision in our Criminal Procedure authorizing it. Under section 15 of the Ordinance the Police Magistrate may record certain statements and confessions by the accused, and in that very section there is provision that such statements and confessions purporting to have been duly recorded and signed shall be admissible in evidence without further proof; but section 16, which deals with questions and answers, has no provision as to their admissibility in evidence at the trial without further proof. The reception of these questions and answers in this case prejudiced the accused. The questions embody some incriminating statements said to have been made by the accused at some time before the Police Magistrate, but those statements themselves had not been put in evidence at the trial. That being so, the accused was under no liability to explain them at the trial, and questions regarding them could not be put, the object of the provision in section 16 of the Ordinance being to enable the accused to explain any circumstances appearing in the evidence against him.

Dias, C. C., contra.

11th October, 1895. BONSER, C.J.—

In this case four men were tried on a charge of robbing a temple, and were convicted. Certain questions put to the first and second accused by the Police Magistrate in the preliminary inquiry under section 16 of Ordinance No. 1 of 1888, and the answers thereto, were put in evidence by the prosecution, by simply producing the record which purported to be signed and certified by the Magistrate in the manner provided by section 136 of the Criminal Procedure Code. No one was called to prove that these questions were put and these statements were made, and it was assumed that they were admissible in evidence by virtue of section

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473 of the Criminal Procedure Code, as explained and amended by section 15 of Ordinance No. 1 of 1888. The Ordinance No. 1 of 1888 first introduced the procedure of questioning the prisoner with a view to enabling him to answer points in the evidence for the prosecution which told against him. It is a very useful provision for an innocent man. A man may forget the various points which have been proved against him. The object is that the Magistrate or Judge, as the case may be, should call his attention to the points so that he may have an opportunity of explaining them, and may not omit to explain them through forgetfulness of what has been stated, or from ignorance of their bearing and influence.

Section 16 of Ordinance No. 1 of 1888 provides that every question and answer is to be recorded, signed, and certified in the same manner as the examination referred to in sections 368, 369, and 370—nothing more. Now, section 473 of the Code had provided that (1) statements or confessions of an accused taken and recorded, as provided by sections 136 and 368, that is, statements and confessions made out of Court; (2) that statements or confessions made before the Police Court as provided for by sections 171 and 368; (3) that the statement or statement and examination of an accused under section 352 of the Code; and (4) that the deposition of a witness taken and recorded under the provisions of the Code—might, under certain circumstances, be given in evidence in any subsequent judicial proceeding or in any later stage of the same judicial proceeding. It would appear that the intention was to provide that they might be given in evidence without further proof, but that was not so provided. That omission was rectified by section 15 of Ordinance No. 1 of 1888, which provides that all statements and confessions which purport to have been duly recorded and signed in manner provided by section 136, were to be admissible in evidence without any further proof. But neither section 473 of the Criminal Procedure Code, nor section 15 of Ordinance No. 1 of 1888, makes any provision as regards these questions under section 16 of Ordinance No. 1 of 1888, or as regards the answers to these questions. Therefore, if they are to be put in evidence, they must be put in evidence under the general law. They must be proved by some person who was present and heard them. That being so, these questions and answers were wrongly received in evidence by the District Judge. The accused are entitled to insist on the formalities of the law being strictly complied with, and that nothing should be put in evidence against them except it be legally proved. It is impossible for us to say what effect this

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1895. *October 11.* — BONSER, C.J.

improperly recorded evidence may have had on the District Judge's mind. We cannot eliminate it and say that there was sufficient proof without it, and therefore the only course open to us is to quash the conviction, and order the case to be remitted to the District Court for trial with assessors.

There is another point which arose upon this appeal. It appears that one of the accused had made a statement at an early stage of the preliminary inquiry in which he incriminated himself. The Police Magistrate, when examining him under section 16 of Ordinance No. 1 of 1888, very properly brought this previous statement to the attention of the accused and asked him if he had any explanation to offer as to that statement, but he said that he was not in his proper senses at the time, and that it might have been a slip of the tongue. At the trial before the District Judge that question embodying the statement of the accused was put in evidence, but there was no independent evidence that that statement was ever made. I think that that was not fair to the accused. Before that question was put in evidence, the statement of the accused should have been proved against him, which might very easily have been done, as it apparently had been recorded in the proper way.

1896. *January 17 and 21.*

HOLMES *v.* ALIA MARIKAR.

D. C., Colombo, C 5,507.

Action for specific performance of contract, or damages for breach thereof —intention of parties—form of decree.

Where plaintiff prayed for specific performance of a contract set forth in a deed which had been assigned to him, or in the alternative for damages, and it appeared to be the intention of the parties that the defendant should be ready to hand the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to hand over the price stipulated,—

Held, that plaintiff was entitled to a decree for specific performance, and if it be found, for any valid reason, impossible to execute the conveyance ordered, the Court below should decree the defendant to pay to the plaintiff the damages claimed.

THE plaintiff in this case sued the defendant upon a deed of assignment, whereby one Wapuchi Maricar transferred and set over unto him all sums payable upon, and all right, title, and interest in, a certain deed made by the defendant in favour of the said Wapuchi Maricar.

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1896. *January 17 and 21.*

By that deed, dated 6th June, 1893, the defendant agreed to sell and convey to Wapuchi Maricar, within two months of the date of its execution, a portion of a land belonging to him for the price of Rs. 150, and it was further agreed that in the event of the defendant refusing or neglecting to make the conveyance in question, he should refund to Wapuchi Maricar the sum of Rs. 50 paid to him in advance, and pay an additional sum of Rs. 50 as damages.

The plaint alleged that, on or about the 20th of June, 1893, Wapuchi Maricar tendered to the defendant, within the period of two months aforesaid, the price of Rs. 150, and requested him to execute and deliver to him a proper conveyance of the said land, but that the defendant refused and neglected to do so; that thereupon Wapuchi Maricar, by his proctor, requested him to deliver the title deeds of the said premises in order to enable his proctor to prepare the necessary deed of transfer in his favour for execution by defendant, but that the defendant failed to do so.

It was further alleged in the plaint that defendant had notice of Wapuchi Maricar's assignment of the deed of agreement to plaintiff; that on or about the 30th of October, 1893, the plaintiff tendered to the defendant Rs. 150, the price of the land, and requested him to execute and deliver to him a conveyance of the said land, or to deliver to his notary, Mr. Perera, the title deeds of the said premises for the purpose of preparing a deed of conveyance for execution by the defendant; and that the defendant refused and neglected to do so.

The plaintiff prayed that the defendant be ordered to convey to the plaintiff the said land upon a proper deed of conveyance, receiving from the plaintiff the said sum of Rs. 150; and in the alternative that defendant be decreed to pay to the plaintiff the sum of Rs. 50 paid by Wapuchi Maricar to him, and a further sum of Rs. 50 as damages.

The defendant pleaded, *inter alia*, that the plaintiff could not claim specific performance of the agreement set forth in the deed of agreement between Wapuchi Maricar and the defendant.

The question of law thus raised was discussed on the trial day. The District Judge ruled in favour of the plaintiff and ordered the case to be listed for trial on the merits. On a subsequent day he dismissed plaintiff's action, on the ground that he was not satisfied with the evidence laid before him of the tender of the price to the defendant.

Plaintiff appealed.

Dornhorst and *Sampayo* appeared for appellant, and *Bawa* for respondent, on the 17th January, 1896.

Cur. adv. vult.

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1896.
January 21.

WITHERS, J.

21st January, 1896. WITHERS, J.—

This is an action to compel specific performance of an agreement to sell a certain piece of land, more particularly described in the schedule at the foot of the plaint, or in the alternative for damages. The parties to the agreement containing the promise to sell this land were one Wapuchi Marikar and the defendant. The agreement bears date the 6th of June, 1893. By that agreement the defendant, in consideration of the sum of Rs. 50 paid in advance, and admittedly received, covenanted with the said Marikar, the plaintiff's assignor, that within two months from the date of the agreement he would sell, convey, and transfer to the said Marikar the piece of land in question on a valid and marketable notarial document for the sum of Rs. 150. The said Marikar for his part convenanted with the defendant, that within the said period of time he would purchase this piece of land for the sum of Rs. 150 upon a valid and marketable notarial document. It was further agreed between the parties that, in the event of the defendant refusing or neglecting to sell and transfer this piece of land on a valid and marketable notarial document within the time given, for the said sum of Rs. 150, he would refund to the said Marikar the Rs. 50 paid and received in advance, together with an additional sum of Rs. 50 by way of damages ; and in the event of the said Marikar refusing or neglecting to purchase the said land for the sum of Rs. 150, he was to forfeit to the defendant the sum of Rs. 50 paid in advance. Lastly, it was agreed that the said Marikar should bear the expense of preparing the conveyance.

On the 12th October, 1893, the said Marikar assigned to the plaintiff all his right and interest in the said agreement.

The intention of the parties to be gathered from their act was, I think, that within the time stipulated, if either required it of the other, the defendant should be ready to hand the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to hand over the price of Rs. 150. In short, the fulfilment of the respective promises was to be simultaneous. Not that the obligations were conditional.

As to the payment of the expense of preparing the document, I think the utmost which defendant could do would be to detain the document as a lien, he having of course the right to recover the amount as money paid at the other party's request.

Before going into the merits of the case it is necessary to determine the point of law raised in the Court below and pressed upon us in appeal by Mr. Bawa, and that is, whether the doctrine of specific performance is known to our law ; not that this point,

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even if determined in defendant's favour, would conclude the case, for the plaintiff claimed alternative relief: specific performance in the first place, and if that relief was not open to him, damages for the alleged breach by defendant of his agreement.

The District Judge, as regards the merits of the case, has found against the plaintiff on both grounds of relief, and has dismissed his action altogether.

To this judgment I shall revert after dealing with the question of law.

If this was a case of first impression, I should pay more regard to the passages in the books relied on by Mr. Bawa, but really I think it is too late to call in question the law as it has been administered in our Courts.

The right specifically to compel a person to give something which he has promised to give, or to do something which he has promised to do, has been frequently recognized and given effect to in our Courts. If the thing cannot be given or done, then its equivalent, *id quod creditoris interest præstationem fieri*, is exacted. The present is a common case in our Courts. It has been before the Supreme Court since 1837. Take the cases reported in *Morgan and Beling, p. 145 (1837); 43/55, Rámanáthan's Reports, p. 152 (1851); Grenier, D. C., p. 39 (1873)*. No doubt the point on those cases was not taken, but had there been any doubt about the law it surely would have been taken; but the case cited by Mr. Dornhorst shows that in later times the right has been distinctly recognized of compelling the specific performance of a covenant to sell a piece of land—*e.g., S. C. M., 19th November, 1886, D. C., Negombo, 14,007*.

Let me add the authority of Van der Linden and Grotius. As to Van der Linden, see Juta's translation, 2nd edition, p. 107, sections 6 and 7, chapter XIV.: "If the obligation consists in "doing something, the creditor can compel the defendant to "perform the act or to pay damages and interest." As for Grotius, see Herbert's translation, p. 300, chapter XLI.

Further, our Civil Procedure Code, section 331 *et seq.*, takes this law for granted.

So much for the question of law.

Mr. Bawa, however, urged that plaintiff's assignor was bound to tender to the defendant within the stipulated time the price of Rs. 150 before he could exact the document of transfer; that this was a condition precedent to his right to demand, and defendant's obligation to execute a transfer. In any event, he argued that plaintiff was precluded from calling for the transfer, inasmuch as he had not brought the Rs. 150 into Court. In the view I have

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1896. January 21. — WITHERS, J.

taken of the agreement which the parties entered into, I am of opinion that the plaintiff's assignor was not bound to tender this sum of money, or even bound to bring it into Court. The plaintiff is no doubt bound to hand the money to the defendant as soon as the defendant has executed the document of transfer.

The question remaining for decision is, has the plaintiff shown himself entitled to demand specific performance or damages? The District Judge has dismissed the action because, in his opinion, the plaintiff failed to establish a legal tender of the Rs. 150 within the stipulated time. I am not disposed to say that that finding of fact is wrong, but, as I have said before, the plaintiff was not required to tender the price as a condition precedent. I think all that the plaintiff was bound to establish was that he required the defendant to execute the promised transfer, and that he was ready and able, on that being done, to pay the Rs. 150 to the defendant. So much I think he has established, and in my opinion he is entitled to relief.

To which form of relief then is he entitled? It seems to me he is entitled, in the first instance, to an order directing the defendant to execute a transfer. He will not have the conveyance delivered to him till he has paid into Court Rs. 150 for the defendant's benefit and secured the payment of the expenses, if any, agreed or found to be due for the preparation of the transfer.

Before framing the decree, I would like to say one word about an encumbrance which was mentioned to us as affecting the premises. The argument on this part of the case left me under the impression that the nature and amount of the mortgage over the premises was known to the plaintiff to exist when he entered into the agreement to buy the land, and that what he engaged to pay for the land was the price of it with that particular encumbrance subsisting.

I set aside the judgment, and order the defendant to execute a conveyance of the land in favour of the plaintiff, and to produce it to the Court on a day to be fixed by the District Judge. If the defendant refuse to obey the order, the Court below will deal with the case in the manner required by the 331st and subsequent sections of the Civil Procedure Code.

If a draft conveyance, whether settled by the parties or the Court, is eventually prepared, the Court will require the plaintiff to pay into Court the sum of Rs. 150, and pay or secure the payment of the amount (if any) found to be due for the expense of preparing the draft.

That done, the conveyance will be delivered to the plaintiff and the money to the defendant.

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If it is found impossible for any valid reason to execute the conveyance, the Court will decree the defendant to pay the plaintiff a sum of Rs. 100.

The appellant should have his costs in both Courts.

LAWRIE, J.—

I agree. Our Courts in Ceylon are Courts of Equity, and I do not doubt that they have power to interfere and decree a specific performance of agreement. For myself, I may say that for many years I have regarded the chapter on specific performance in Story's Equity Jurisprudence as applicable and as of authority in Ceylon.

This contract was not performed within the time originally fixed. For that both parties are (I think) to blame; but the defendant is more to be blamed than the plaintiff's assignor, because (as I read the contract) it lay on the defendant (who had received an instalment of the price) to prepare and to offer a conveyance. It was not until that was done that the plaintiff's assignor was bound to pay the money. Within the time fixed it was the assignor's duty (if he wished to purchase) to give the defendant notice that he had the money ready, and desired the conveyance to be prepared and signed, but he was not, I think, bound to tender the money absolutely and unconditionally. The defendant has not shown that subsequent events have made it impossible for him to perform his contract, and I therefore agree in the judgment of my brother Withers.

The decree entered was as follows :—

" It is ordered and decreed that the decree made in this action by the District Court of Colombo, and dated the 17th October, 1894, be and the same is hereby set aside, and in lieu thereof it is ordered and decreed that the defendant do execute a conveyance of the land in question in favour of the plaintiff, and produce it in Court on a day to be fixed by the District Judge. If the defendant refuse to obey this order, then the said Court will deal with the case pursuant to section 331 and subsequent sections of the Civil Procedure Code, but if a draft conveyance, whether settled by the parties or by the Court, is eventually prepared, then it is ordered that the said Court do require the plaintiff to pay into Court the sum of Rs. 150, and further pay or secure the payment of costs (if any) incurred in the preparation of the draft conveyance. On these conditions being fulfilled, it is ordered that the said Court do deliver the conveyance to the plaintiff and the money to the defendant.

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1896.
January 21.

"And it is further ordered, that if it be found, for any valid reason, impossible to execute the said conveyance, the said Court do then decree the defendant to pay to the plaintiff the sum of Rs. 100.

"And it is also further ordered and decreed that the defendant do pay to the plaintiff his taxed costs of this action, both in the said District Court and in this Court."

1896.
February 8 and 14.

SIMAN APPU *v.* CHRISTIAN APPU.

D. C., Colombo, 1,980.

Ordinance No. 22 of 1871, s. 3—"Uninterrupted and undisturbed possession."

WITHERS, J.—"Possession" of a land must be continuous, peaceful, and for a certain period.

It is "interrupted" if the continuity of possession is broken either by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing is not in occupation.

And possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user.

LAWRIE, A.C.J.—If the actual physical possession has never been interrupted, it matters not that the possessor has been troubled by law-suits or by claims in execution or by violence. If he has succeeded in holding possession, such attempts to oust him only make it the more certain that he held adversely to those who disputed with him.

PLAINTIFF alleged that one Don Daniel, being the original owner of the land in dispute, mortgaged it with the plaintiff and one Fernando as security for due payment of a certain sum of money; that the plaintiff and his co-creditor instituted an action against Don Daniel for the recovery of the said sum of money, and on judgment being obtained caused the Fiscal to seize the property under mortgage; that at the sale the plaintiff and his co-creditor purchased the same and obtained a Fiscal's transfer: that subsequently the plaintiff and his co-owner sold the said land to one Jusey Silva and Susey Pulle, who were put in possession by them, and who mortgaged the same property to the plaintiff as security for the payment of the purchase money; that the said

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Jusey Silva and Susey Pulle having failed to pay plaintiff his moiety of the said purchase money, the plaintiff sued them for the recovery of the same, and having obtained judgment issued writ and seized the property, whereupon the present defendant claimed the same before the Fiscal who, in terms of section 241 of the Civil Procedure Code, reported the claim to the District Court, which after inquiry directed the release of the said land; and the plaintiff prayed (1) that his execution-debtors, Jusey Silva and Susey Pulle, be declared to be the owners of the said property at the date of the seizure thereof under the said writ, and the same liable to be sold in execution; (2) that the defendant's claim to the said property be declared groundless, and be set aside; and (3) that the defendant be condemned to pay the plaintiff the sum of Rs. 200 as damages.

The defendant by his answer denied all the above allegations, save that he claimed the land and that his claim was upheld by the District Court. He further pleaded that this land originally belonged to the Crown, and that the Crown, in consideration of the long possession of the same by the defendant, granted to him a certificate under the 7th clause of the Ordinance No. 12 of 1840 declaring that the Crown had no title thereto. He further claimed the benefit of the 3rd section of the Ordinance No. 22 of 1871, alleging that he was in the undisturbed and uninterrupted possession of the said land for ten years and upwards previous to the institution of the present action, by a title adverse to and independent of the said Jusey Silva and Susey Pulle and their predecessors in title.

The District Judge heard evidence on both sides, and decided the case in favour of the plaintiff, holding that the two District Court cases bearing Nos. 41,552 and 69,316, relied on by the plaintiff's counsel, were *res judicata*, and estopped the defendant from denying the right of the plaintiff's execution-debtors, who derived their title from one Don Christian and Don Daniel; that Don Christian had sued the defendant in case 41,552 and got judgment for this land as far back as 1865, and that Don Daniel had also sued defendant in 1876 for this land, when the defendant admitted Don Daniel's right to 11 acres out of the 17 acres he claimed; that the 11 acres decreed to Don Daniel in 1877 were the indentical 11 acres now in dispute; that the judgments in both those cases were *res judicata* as between defendant and plaintiff, whose title ultimately rested on Don Christian and Don Daniel; that defendant had never enjoyed quiet possession for ten years; that eight years before the trial there was a riot on the land, when a house was burnt down and defendant was tried for

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1895.
February 8 and 14.

BROWNE, A.J.

shooting some people; and that though the defendant had all along resisted, and successfully resisted, dispossession, yet his possession was anything but undisturbed and uninterrupted.

In these circumstances, the District Judge gave judgment for plaintiff.

The defendant appealed, and the case was heard in appeal on the 8th February, 1895.

Dornhorst and *Morgan*, for appellants.

Drieberg and *Seneviratna*, for respondents.

Cur. adv. vult.

14th February, 1895. BROWNE, A.J.—

Plaintiff did not at all base his claim in his plaint upon the previous decisions of the lower court in the suits 41,552 and 69,316 respectively. Those decisions were of the years 1868 and 1877, and the evidence in the case is that the defendant was not removed from his possession by legal process as the result of either of them. Even had he been, there was ample time thereafter before this action was instituted in December, 1891, for the defendant to have acquired a fresh title by prescription. I could not therefore affirm the decision for the reason of *res judicata* given by the learned District Judge.

Then there is no clear proof here that any action thereafter was instituted against defendant in regard to this land, the effect of which would have been that the *litis contestatio* or *vocatio in jus* would have effected a constructive or civil interruption as held by this Court in 12,911, D. C., Kurunegala (*S. C. Min., 19th July, 1854*); 9,601, D. C., Jaffna (*Rámanáthan, 1862, p. 189*); 37,705, D. C., Galle (*ibid, 1877, p. 133*). As to this, see the later judgment of this Court (*2 C. L. R. 103*), that with the decision of the suit the interruption ceases and is effaced.

As to the other disturbance, which is the entry of the plaintiff and his plucking fruits in 1855, though on being resisted he left the land, it was held a disturbance of defendant's naked possession for over ten years (19,802, D. C., Matara, *Legal Miscel, 1864, p. 56*). I find no proof here of interruption or disturbance at any date within ten years of action instituted proved to have been made by plaintiff or his predecessor in title of the defendant. I do not know who is the Peris Sinho by whom he mentions an attempt was made to disturb him "five or eight years ago," and as to what Susey Pulle did when he "tried to oust" defendant and the latter shot a man in "regular riot." No particulars are given. It may be that not a man ever set foot on the land itself, nor that the defendant was a loser of a nut thereby.

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I accept entirely the verdict of the learned District Judge that defendant has always resisted all attempts to oust him, and I hold him entitled to a decree in his favour, so long as it has not been proved and held that his possession was interrupted or disturbed.

WITHERS, J.—

I am also of opinion that judgment should have gone for the defendant.

I am not aware of any decision of our Courts which explains the sense of the words "uninterrupted and undisturbed possession" used in our Prescription Ordinances. Interruption or disturbance might occur in different ways, according as the land or other immovable property was the subject of a title alleged to be acquired under these Ordinances.

Possession of a land must be for a certain length of time, must be continuous, and must be peaceful.

Possession is interrupted if the continuity of possession is broken by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party prescribing is not in occupation.

Possession is disturbed either by an action intended to remove the possessor from the land or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous into a disconnected and divided user.

Such, roughly speaking, are the considerations which I should be disposed to look to in deciding the question whether there has been such a disturbance or interruption of possession of a land as would defeat a claim to a decree of title by prescription.

I can find in this case no evidence that the defendant was ever disturbed or interrupted in the sense above indicated within ten years previous to the bringing of this action.

LAWRIE, A.C.J.—

The learned judge finds on the evidence that "the defendant "has been residing on the land for many years, and that he has "disputed with various claimants, and he has resisted all efforts "to oust him."

In another part of the judgment he says, "defendant has all "along resisted, and successfully resisted, dispossession." If the actual physical possession has never been interrupted, it matters

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1896. February 8 and 14.

LAWRIE, A.C.J.

not that the possessor has been troubled by lawsuits, or by claims in execution, or by violence ; if he has succeeded in holding possession, these attempts to oust him only make it the more certain that he held adversely to those who disputed with him.

Until they succeed in getting the decree of a competent court on which they evict him, his possession is good as against his opponents.

Here it is clear that the possession of the defendant has not been interrupted during the ten years before action. Has it been undisturbed ? A disturbance is something less than an interruption ; it is a disturbance if for a time some one succeeds in getting partial possession, not to the entire exclusion of the former possessor, but jointly with him.

In my opinion, there has been no disturbance, and I would set aside the judgment and dismiss the action with costs.

1895. July 16.

READ *v.* SAMSUDIN.

C. R., Colombo, 8,823.

Action by secretary of a voluntary association—Inadmissibility of technicalities of law in Courts of Requests—Right of plaintiff to sue—Motion to take plaint off the file—Proper mode of dealing with the question of right to sue—Civil Procedure Code, s. 16—Costs.

A voluntary association cannot by agreement between its members give any individual the right to sue on their behalf.

Where it is practically impossible for a body of numerous members to appear as plaintiffs, the Court may make an order under section 16 of the Civil Procedure Code, permitting one or more of such members to sue on behalf of the rest.

It is not the duty of a Judge to throw technical difficulties in the way of administering justice. He ought to remove them out of the way upon proper terms as to costs and otherwise.

In a Court of Requests all technicalities of law should be avoided.

When a plaint, defective in some material respect, has been filed, it is not necessary to move that it be taken off the file, but it is the duty of the Court, of its own accord, or upon its attention being called, to reject the plaint or return it to plaintiff for amendment. If the plaint is good *ex facie*, any objection thereto must be taken by the answer.

Where defendant, a member of a voluntary association, objected at the trial to the reception of certain rules made by the association, on the ground that such rules were not included in any list of documents filed by the plaintiff,—

Held, that defendant should be deprived of his costs in the Court below.

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THIS was an appeal preferred by the plaintiff against the dismissal of an action which he had brought in the Court of Requests of Colombo as Honorary Secretary of an institution known as the Colombo Library, for the recovery of a certain sum of money said to be due by the defendant, who was one of its members, for monthly subscriptions unpaid, and for the value of certain books taken out by him and not returned.

The facts in detail are set forth in the judgment of his Lordship the Chief Justice.

Jayawardena, for the appellant,—

The plaintiff has no right to maintain this action as the Honorary Secretary of the Colombo Library, such library being a merely voluntary association, and a voluntary association cannot even by agreement between the members give any individual the right to sue on behalf of the members. He cited *Evans v. Hooper, 11 Q. B. D. 45 ; Gray v. Pearson, 5 C. L. R., 568 ; I. L. R. 14 Madras, 362.*

Dornhorst, for respondent.—The authorities cited do not apply because, according to the rules of the library to which the defendant subjected himself when he became member, the secretary has power to sue. The objection, even if valid, is a purely technical one, and could be met by amendment.

16th July, 1895. Bonser, C.J.—

In this case the plaintiff, describing himself as Honorary Secretary, Colombo Library, sued the defendant to recover certain subscriptions alleged to be due to the Colombo Library, and the value of certain books which were said to have been taken out by the defendant from the library and never returned.

The defendant, in the first paragraph of his answer, denied the plaintiff's right to sue.

When the case came on for trial, evidence was given on behalf of the plaintiff in support of the action, and the plaintiff sought to put in a copy of the rules of the library. This was objected to, on the ground that the rules of the library were not included in any list of documents filed by the plaintiff, although they were referred to in the plaintiff's statement of claim, and were evidently relied on. That such an objection should have been upheld is to me astounding, especially in a Court of Requests, which is a Court from which all technicalities should be banished.

There was no question of these being the rules of the society. The objection was purely a technical one.

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1895.
July 16.
BONSER, C.J.

Now, I will read what one of the greatest Judges that ever adorned the bench, Sir George Jessel, Master of the Rolls, said on this subject in the case of *Jones v. Chennell, 8 Ch. D, 506*. An objection had been taken there to the admission of certain depositions, on the ground that the proper notice of intention to read them required by law had not been given. He says: "That "notice was not given, but the appellant endeavoured to read the "evidence and tender it in the Court below. It was rejected "upon the ground of want of notice. It is disputed whether or not "the counsel for the party desiring to use that evidence did or "did not ask for an adjournment; but in my opinion the Judge "below ought to have granted the adjournment as a matter of "course without being asked for it. It is not the duty of a Judge "to throw technical difficulties in the way of the administration of "justice, but where he sees that he is prevented from receiving "material or available evidence merely by reason of a technical "objection, he ought to remove the technical objection out of the "way, upon proper terms as to costs and otherwise. I have "known an objection taken at the trial to the admission of a docu- "ment which everybody knew to be a genuine one; and I have "known the Judge say to the person taking the objection, 'I "'will adjourn the cause, but reserve the costs,' and thereupon "the objection has been withdrawn. That I have seen more than "once, and I cannot help thinking that if the Judge in the Court "below had offered the adjournment, the other side would have "allowed the evidence to be read."

Those observations of the late Master of the Rolls ought to be borne in mind by every Judge in this Colony.

The trial went on, and the Commissioner gave judgment for the plaintiff. He overruled the objection taken by the defendant in his answer to the right of the plaintiff to sue, on the ground that the objection ought to have been raised by a motion to take the plaint off the file, and that by answering to the merits the defendant has practically admitted the sufficiency of the plaintiff's authority and of the allegations in the plaint. Now, I must confess I cannot understand this. There is no provision in the Ordinance for such a motion as the Commissioner refers to. The Code makes it the duty of the Court to scrutinize the plaint before it is received, to see that it complies with all the requirements of the Code, that it is duly stamped, that it discloses a good cause of action, &c.; and if after having carefully examined the plaint the Court is satisfied that the plaint complies in all respects with the requirements of the law, then the Court is bound to accept the

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plaint. The Code lends no countenance to any such practice as that suggested of a motion by defendant to take the plaint off the file.

If the plaint is defective in some material points, and that appears on the face of the plaint, but by some oversight the Court has omitted to notice the defect, then the defendant, on discovering the defect, may properly call the attention of the Court to the point, and then it will be the duty of the Court to act as it ought to have done in the first instance, either to reject the plaint or to return it to the plaintiff for amendment. If the plaint is a good one on the face of it, but the defendant has reason to urge why the plaintiff is not entitled to sue him, that objection must be taken by the answer.

I hope this is the last occasion on which we shall hear of a motion in a Court of Requests to take a plaint off the file.

In my opinion the objection that plaintiff had no right to sue this defendant was rightly taken by the answer, and ought to have been disposed of by the Judge. Now, the objection taken by the defendant is this. He says : " You (the plaintiff) have no right to " sue me. I have not injured you, nor is there any contract between " you and me under which you can sue me. I am a member of a " voluntary association called the Colombo Library, and the per- " sons who are injured, if any one is injured by my conduct, are the " other members of that association, and it is they, and they alone, " who can sue me." I think that is a good objection. No contract was proved between the defendant and the plaintiff which gave the plaintiff the right to sue this defendant. It was said that the rules of the library authorized the secretary to sue, but in my opinion the cases referred to by Mr. Jayawardena—*Evans v. Hooper* (*1. Q. B. D. 45*) ; *Gray v. Pearson* (*5 C. L. R., 568*)—show that voluntary associations cannot by agreement between the members give any individual the right to sue on behalf of the members. Therefore I think this objection ought to have been upheld and the plaintiff's action dismissed.

The defendant will have the costs of this appeal. But there will be no costs in the Court below. I deprive the defendant of his costs in the Court below, because he insisted on the objection as to the admissibility of the rules.

I should add that the Code in section 16 makes provision for such a case as this, where it is practically impossible for a numerous body of members to be made plaintiffs. The Court may make an order permitting one or more of such members to sue on behalf of all parties so interested.

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1895.
November 1.
WITHERS, J.

QUEEN *v.* DE SILVA.

D. C., Galle (Criminal), 12,156.

Intentionally giving false evidence—Trial of offence by the Judge before whom such evidence was given—Propriety of such trial.

Where a witness has intentionally given false evidence in a case before a District Judge, it is not improper on his part to try him for such offence upon a committal duly made.

But it would have been more satisfactory if at such trial he had the assistance of assessors.

THE accused in this case was found guilty on the 10th October, 1895, by Mr. H. L. Moysey, District Judge of Galle, of intentionally giving false evidence in another criminal case (No. 12,130) heard and determined by him on the 5th June, 1895. The accused was sentenced to two years' rigorous imprisonment.

On appeal, *Dornhorst* appeared for him.

1st November, 1895. WITHERS, J.—

I do not see my way to disturb the judgment or interfere with the sentence.

The chief point made by Mr. Dornhorst was, that this case was tried and determined by the same Judge before whom the accused was alleged to have given false testimony in certain criminal proceedings taken a few months ago before him.

However honourable and just a Judge may be (and, as admitted by counsel, no Judge could be more honourable and just than the present one), it was urged that he must come with a certain bias in his mind to the determination of the question which he had intentionally decided against the accused on a former occasion. This, however, it seems to me, is a risk that must be run sometimes in the course of a judicial inquiry.

For instance, as Mr. Dornhorst mentioned, the same jury who heard them made are very often called upon to try the question whether a man is guilty of making contradictory statements, and so forth.

I need only say that I wish it had occurred to the Judge in this instance to call in the assistance of assessors. Assistance of this kind is very valuable to a Judge in case of falsehood or fraud.

But after such a careful and patient trial as this accused has had in the present instance, I do not think it necessary to send the case for re-trial before the same Judge with assessors.

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1895.
September 3.
WITHERS, J.

SOMASUNDARAM *v.* IBRAHIM SAIBU.

D. C., Chilaw, 1,173.

Principal and agent—Power of attorney to minor—Civil Procedure Code, s. 24.

A minor holding a general power of attorney for his principal abroad is competent to act as his agent for the limited purposes mentioned in section 24 of the Civil Procedure Code.

UNDER section 650 of the Civil Procedure Code, plaintiff obtained against the defendant a warrant in mesne process and had him arrested. He entered into a security bond and was released. On the 9th May, 1895, he moved to take the plaint off the file and to be discharged from the security bond, on the ground (1) that he had paid and settled the promissory note sued upon; (2) that Somasundaram Chetty, who held the plaintiff's power of attorney, and through whom the action was instituted, was a minor below the age of twenty-one years; and (3) that the allegations made by Somasundaram Chetty in support of his motion for the warrant in mesne process were false and vexatious.

The District Judge allowed the defendant's motion after evidence heard.

Plaintiff appealed.

Dornhorst appeared for appellant, and *Sampayo* for defendant respondent.

3rd September, 1895. WITHERS, J.—

The plaint has been ordered to be struck off the file, and it is this order of the 9th June last which has been appealed from.

The action is to recover money on a promissory note. The plaintiff is one Palaniappa Chetty, and the suit is instituted by his attorney, Somasundaram Chetty.

It is because this attorney has not attained the age of twenty-one years that the order complained of was made.

The question here is really this,—May not a minor holding the general powers of attorney for his principal abroad, which is indicated in section 25 (*b*) of the Civil Procedure Code, act as a recognized agent for the limited powers mentioned in section 24?

The said Somasundaram Chetty holds such a power; then why should he be not allowed to appear and act as the recognized agent of his principal? He has appointed an attorney-at-law to prosecute his principal's suit.

He is a young man of twenty, and has been engaged in trade for the last three years. The English law which governs the relations of principal and agent in this Colony is not against him —that I am aware of. A naked authority which is delegated by a

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1895. September 3. — WITHERS, J.

power of attorney may be exercised by any one whether *sui juris* or not, so long as he is of sane mind. (*Co. Litt. 52 a.*)

This is a pure delegation involving no liability, and I do not see why a person of competent understanding, and being one of the persons mentioned in the said section 25, should not be allowed to act as a recognized agent. He simply represents his principal when he appears, and is his mouthpiece when he makes an application. He is in no sense a public officer who must be *sui juris*.

I do not think this order should have been made, and I would remit the record for trial in due course.

Plaintiff will have his costs.

BROWNE, A. J., agreed.

1895. September 26.

WIKRAMASOORIYA *v.* APPUSINHO.

P. C., Balapitiya, 14,269.

Criminal Procedure Code, ss. 175, 238, and 242—Power of Police Magistrate to try a lower offence, while a charge for a higher offence beyond his jurisdiction remained formally undisposed of—Power of "Attorney-General" under ss. 241–243.

Complaint was made against accused for intentional insult under section 484 of the Penal Code and criminal intimidation under section 486. The Magistrate heard evidence, formulated charges under both these sections, and forwarded proceedings to the Solicitor-General under section 175 of the Criminal Procedure Code. On the return of the record to the Police Magistrate, he proceeded to try the accused summarily for the offence under section 484 only, and convicted him of it. At this trial the complainant and his witnesses confined themselves to that part of their story which applied to this offence and omitted the rest of it:

Held, that such procedure was irregular.

The intention of section 238 of the Criminal Procedure Code, as amended by Ordinance No. 22 of 1890, is to prevent the Magistrate being satisfied that the evidence disclosed an offence which he had no jurisdiction to try, and having framed a charge for the graver offence was not at liberty to dispose of the minor offence.

Observations of the Chief Justice on the impropriety of getting witnesses to say only what will square with the particular charge which the Court has determined to try.

Under sections 241, 242, and 243 the "Attorney-General" may follow one of these courses: (1) If he is satisfied that the proceedings are in order, he may nominate the Court of trial. (2) If he thinks that no further proceedings should be taken, he may direct the discharge of the accused. (3) If he finds the evidence defective, he may require the Magistrate to take further evidence.

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THE facts of the case are fully set forth in the judgment of his lordship the Chief Justice. 1895. *September 26.*

Pereira, for accused appellant, cited *Christian v. Pedro, 2 C. L. R., p. 197*, and contended that it was irregular on the part of the Police Magistrate to have tried the accused for the lower offence, dropping the charge formulated in respect of the higher offence which was triable only by a higher court. Such a procedure was inconsistent with Ordinance No. 22 of 1890, section 238.

Jayawardene, for respondent. The case cited can be differentiated from the present case. There the facts on which the Magistrate convicted the accused of affray were necessary to constitute the graver offence of rioting. When the facts which make up the minor offence do not enter into the constitution of the graver offence, the Magistrate can try the minor offence and commit the accused for trial on the graver offence. The test is to see whether the verdict of the Magistrate could be pleaded in bar—as autrefois acquit or autrefois convict—to an indictment on the graver offence. In this case, the Magistrate has in no way adjudicated on the facts which go to make up the graver offence. Hence, the verdict of the Magistrate cannot be pleaded as a plea of autrefois acquit or autrefois convict.

His Lordship desired to hear the Solicitor-General upon the points involved.

Rámanáthan, S.-G., appeared for the Crown,—

It was open to the Police Magistrate to discharge the accused from the higher charge. The framing of the charge shall not, indeed, take place except when there are sufficient grounds for comitting the accused, as provided in section 169, but here, for the sake of convenience and economy of time, the charge was framed even though the evidence was insufficient, and the case forwarded to the Solicitor-General, who returned it, apparently with the opinion that it was not worth while committing the case to a higher court upon the charge laid under section 486 in view of the fact that the threat to cause death was made in self-defence, when the complainant took up a stick to strike the accused. If a formal order of discharge under the hand of the Attorney-General is held to be necessary so as to justify the Magistrate's order of discharge, it may be produced *nunc pro tunc*. [BONSER, C.J.—If that be so, "all the proceedings taken upon such inquiry shall "cease and be determined," and the proceedings in respect of the lesser offence would also cease]. No, because "such inquiry" in section 424 would refer only to the "complaint, information, or "charge" in respect of the higher offence. It would not affect the

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1895. September 26. — BONSER, C.J.

proceedings on which the lesser offence rests. The spirit of section 238 has not been violated, as the conviction for the lesser offence was not arrived at with the object of withdrawing the higher offence from a higher tribunal. [BONSER, C.J.,—But what justification has the Magistrate for recording, at the later inquiry or trial, only so much of the evidence as relates to the lower offence ?] He might have thought it unnecessary to burden the record with evidence irrelevant to the lower charge, which had been dropped.

26th September, 1895. BONSER, C.J.—

In this case the appellant was charged and convicted of the offence of insult under section 484 of the Penal Code, and was sentenced to undergo one month's imprisonment. He has appealed against that decision, and claims that he ought to be tried by a higher Court. Now, the facts of the case are these : a complaint was filed against him charging him, first, with insult under section 484, and secondly, with criminal intimidation under section 486, the threat being to cause death. The latter was an offence which the Magistrate had no power to try. The Magistrate entertained the complaint and heard the evidence of the complainant and his witnesses, who all swore to the fact that appellant drew a knife and threatened to kill the complainant, and was only prevented from using the knife by the interference of his brother.

The Magistrate, after hearing the evidence, was apparently of opinion that there were sufficient grounds for committing the accused for trial, for he framed charges under section 484 and section 486—he framed a double charge—and then, as required by section 175 of the Code, forwarded the proceedings to the "Attorney-General," in order to be instructed by him as to the Court to which the committal should be made. Now, the duties and powers of the Attorney-General on receipt of such proceedings are set out in section 241 and the following sections. There appear to be three courses. The first is, if he is satisfied that everything is in order, to specify the Court which is to try the case, whether it is to be the District Court or the Supreme Court. If, however, he is of opinion that no further proceedings should be taken in the case, he may make an order in writing, signed by himself, directing the accused to be discharged from the matter of the complaint, information, or charge. If he takes that course, section 242 provides that all proceedings shall cease and be determined, and that makes an end of the case. The third course is that if he is of opinion that there is a criminal offence disclosed, but that the evidence is defective, he may order the Police Magistrate to take

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further evidence in order to supplement the defect. These appear to be the three courses open to him.

What was done by the Attorney-General in this case does not appear. There is no record of it. But when the parties appeared again before the Magistrate he proceeded to try the accused summarily on the first of the two charges, the charge under section 484, and with the result I have mentioned. The appellant says that that course was irregular, and that having been charged with an offence under section 486, one of the three courses to which I have referred ought to have been taken; and that it was not competent for the Court, while the graver charge was still hanging over his head, to deal with the lesser charge.

He also relied upon section 247 of the Criminal Procedure Code, which provides for the Attorney-General designating the Court before which the case is to be tried, and requires that it must be either the Supreme Court or a District Court; and he says that the Attorney-General has no power to designate the Police Court, as has been done in this case. However that may be in this case, there is no evidence that the Attorney-General did direct it to be tried in the Police Court, and we must deal with it as if the Magistrate on his own initiative imposed on himself the duty of dealing with the lesser charge.

It was also urged that the course taken was inconsistent with section 238 of the Ordinance No. 22 of 1890. That section provides that where a Police Court is dealing with an offence which is not triable summarily, "it shall not be at liberty to disregard "material parts of the evidence and convict for a lesser offence, "and so withdraw the case from the proper tribunal, but that it "shall be the duty of such Court to stop further proceedings "under that chapter and to proceed under chapter XVI.," that is, it must take proceedings with a view to commit the accused for trial by a Superior Court.

The Solicitor-General argued that the words "to withdraw the "case from the proper tribunal" meant that the section only applied to cases where there was a deliberate intention on the part of the Magistrate to withdraw the case from the proper tribunal. I do not think that the words necessarily bear that sense. The intention of that section is to prevent what was done in this case, and I am of opinion that the Magistrate being satisfied that the evidence disclosed an offence, which he had no jurisdiction to try, and having framed a charge for the graver offence, was not at liberty to dispose of the minor offence. Now, one evil of such a course appears very clearly in these proceedings. In the first proceeding the complainant and all his witnesses spoke

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1895. *September 26.* — WITHERS, J.

of the threats of the accused to use a knife, and stated how he was restrained by his brother from carrying his threat into execution. On the second hearing the complainant and his witnesses suppressed the whole of the evidence relating to this part of the case, so as to make the affair appear different from the reality. It is said that that evidence was irrelevant to the charge then being tried, and it is suggested that the complainant's proctor abstained for that reason from bringing out this evidence.

It seems to me that this has a serious bearing on the administration of justice. If witnesses are to be taught to say only what will square with the particular charge which they are told is to be established, there will be an end to all confidence in the administration of justice.

One of the great crying evils in our Courts is the way in which witnesses suppress the truth, and tell stories which are made to fit their ideas of what is required by their own interest, or by the interests of persons for whom they appear to give evidence; and anything in the course of practice or procedure which would in any way encourage such a state of things is to be strongly reprobated. Therefore, even if such a course of procedure were technically correct, I should say that it was not for the interests of justice that it should be adopted, and sitting as a Court of Appeal I should discountenance it. It seems to me that the proper order to make would be, that the conviction be quashed, and that these proceedings go back to be dealt with on the charges already framed by the Magistrate, leaving it to the Attorney-General to designate the Court to which the accused should be committed for trial.

WITHERS, J.—The Chief Justice's judgment has my hearty concurrence.

The course pursued by the Magistrate not only defeats the wise policy of section 238 of the Ordinance No. 22 of 1890, but is calculated to stifle truth.

Mr. Jayawardene urged that this offence of insult in the circumstances disclosed was quite distinct from the offence of criminal intimidation under section 426, and that in consequence the Magistrate has power to deal with it summarily.

I am against him on that point, as I consider that the offences were so minutely connected as clearly to embrace one and the same transaction.

It would be at once unfair and impolitic to try this man before the Police Magistrate for insult on one day, and before a Superior Court for intimidation another day. A Court which is competent

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to try the higher offence should try the lesser at one and the same time.

1895. *September 26.* Withers, J.

Speaking for myself, I remain of the opinion which I expressed in the case of *Christian v. Pedro Appu* (reported in *2 C. L. R., p. 197*), and which is accurately put in the head-note as follows :—

Where, after evidence, an accused is charged by a Police Magistrate for an offence not summarily triable, and is not discharged from the matter of the charge, it is not competent for the Police Magistrate, while such charge is still pending, to formulate another charge for a lesser offence arising out of the same circumstances, and to try the accused summarily thereon.

RANESINHE, Creditor and Appellant.

HENRY *et al.*, Claimants and Respondents.

1896. *March 3.* Bonser, C.J.

D. C., Galle, 2,907 (A).

Revisionary power of Supreme Court—Civil Procedure Code, s. 753—Liability of execution-creditor for act of Fiscal—Necessity of surrender, before seizure, of property pointed out by the judgment-debtor—Civil Procedure Code, s. 226.

An order of a District Court, which is wrong *ex facie*, may be quashed by the Supreme Court in the exercise of its revisionary power, even though no appeal may lie against such order.

An execution-creditor who did not authorize the Fiscal to seize under his writ certain property, which upon seizure was rightly claimed by a third party, cannot be condemned to pay the costs of the claim proceeding.

A Fiscal is not entitled to seize property pointed out by the judgment-debtor until it has been surrendered to him.

THE facts of the case appear in the following judgment of the Chief Justice.

De Saram appeared for appellant, and *Alwis* for respondents.

3rd March, 1896. Bonser, C.J.—

This appeal should be dismissed, on the ground that no appeal lies from a claim order. But Mr. De Saram, who appeared for the creditor appellant, has asked us to take up the case in revision, following the precedent of a case recently decided by this Court (D. C., Jaffna, No. 24,021, *Civil Min. S. C.*, Oct. 10, 1895). The ground on which he asks us to exercise our revisionary power is, that the District Judge has made an order condemning him in costs, which order, he urges, is, on the face of the proceedings, wrong.

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1895.
March 3.

BONSER, C.J.

It appears that the judgment-creditor pointed out to the Fiscal certain property, which he said belonged to the execution-debtor. The Fiscal, however, declined to seize this property, but seized an undivided share of a certain garden which the debtor pointed out to him as being his own property. Mr. Alwis's client, who claims to be the owner of that property, at once put in her claim. The claim was referred by the Fiscal to the Court under section 241 of the Civil Procedure Code, and at the hearing of the claim the creditor was there represented by his proctor; the debtor was there represented by his proctor; and the claimant was there represented by his proctor.

The creditor opened the inquiry by saying that he admitted the title of the claimant; that he never desired this property to be seized; and that it was against his wish that the property was seized. The learned District Judge thereupon made an order releasing the property, but ordered the execution-creditor to pay the costs of the proceedings on the ground that the Fiscal is the agent of the execution-creditor, and that a creditor is responsible for whatever the Fiscal does.

That is a proposition which cannot be maintained. Mr. Alwis did not seek to maintain it, and after the decision of this Court in the Jaffna case I do not see how he could do so.

Therefore, in the exercise of our revisionary power, we quash the order. There will be no costs to any party of this appeal.

I would add that Fiscals should note the words "and surrender "to him" which follow the words "as may be pointed out" in section 226 of the Civil Procedure Code. A Fiscal is not entitled to seize property merely because it is pointed out "by the execution- "debtor." Before it can be seized it must be "surrendered" by the debtor. What that means will depend on the nature of the property, but in every case it must mean something more than the debtor pointing out the property for seizure.

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TOUSSAINT *v.* ALIMAKANDU *et al.*

1896. *January 22 and 28.*

P. C., Batticaloa, 10,379.

Civil Procedure Code, ss. 542,543—Wilful omission to report death of intestate—" Duty of widow, widower, or next of kin."

In order to sustain a charge under section 543 of the Civil Procedure Code, it is necessary to prove that the accused are the lawful widow or next of kin of the deceased ; that he died intestate ; and that the accused wilfully omitted to report his death.

Semble, per Lawrie, J.—The 542nd section makes the widow *or* the next of kin liable. The duty seems first to be laid on the widow, and if there be no widow, then on the next of kin. Therefore both should not be convicted unless it is proved that they acted in concert.

THE widow and the son of a deceased person who was alleged to have died intestate were charged with and convicted of the offence of not reporting the death of such person, in violation of section 543 of the Civil Procedure Code.

They appealed, and *Sampayo* appeared for them.

Dias, *C.C.*, for the prosecutor respondent.

28th January, 1896. Lawrie, J.— Lawrie, J.

The charge is defective. It omits to state that the failure to report was *wilful*, a very necessary allegation, because the offence is created by the Ordinance, and is not a *malum in se*. Wilfulness is a material part of the offence. Further, the charge does not set forth that the deceased died intestate leaving property above Rs. 1,000.

The accused are stated to be the next of kin, viz., the widow and the son. The widow is not one of next of kin, and the third accused is only one of several children of the intestate.

The 542nd section makes the widow *or* the next of kin liable. The duty seems first to be laid on the widow, and if there be no widow, then on the next of kin. It is difficult to hold that both are criminally liable, and I would hesitate to sustain this conviction of both unless they had been proved to have acted in concert.

It is not proved that the first accused is the widow. The third accused is proved to be one of several children of the deceased, all of whom are his next of kin.

It is not proved that the deceased died intestate. On the contrary, the deed produced by the notary looks very like a last will of which probate must be taken. It ought, under section 516, to have been produced to the Court by the person in whose keeping it was deposited.

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1896. January 22 and 28. LAWRIE, J.

I acquit the accused, and I direct the Police Magistrate to forward the deed No. 1,791 to the District Judge of Batticaloa in order that he may take such action thereon as may to him seem just and according to law.

1895. September 20.

PIERIS *et al.* *v.* FERNANDO.

D. C., Colombo, 6,580.

Contempt of court—Neglect to comply with order drawn up informally and made ultra vires.

In an action for the recovery of certain jewellery, it being found, after evidence of both parties had been heard, that the plaintiff owed a certain sum of money to the defendant, who was in possession of the jewellery, the District Judge, without entering a decree in favour of either party, recorded his opinion that "the most "equitable course is to order the plaintiff to bring into Court the "sum of Rs. 91 within fourteen days, and the defendant to bring "into Court jewellery also within fourteen days, to abide the further "order and decree of this Court." No formal order was drawn up—

Held, that this order was irregular and *ultra vires*, and that a disobedience of it by defendant did not justify his conviction as for a contempt of court.

THE facts of the case are sufficiently set forth in the judgment of the Chief Justice.

BONSER, C.J.

20th September, 1895. BONSER, C.J.—

In this case the appellant was charged with contempt of court and found guilty by Mr. Templer, Acting District Judge of Colombo, and sentenced to simple imprisonment for a term of six months, or until his contempt was purged by producing certain articles in Court. The contempt of which the appellant was found guilty was disobedience of the direction of the Court as to bringing certain articles into Court within fourteen days from the date of the direction.

The action was an action for the recovery of certain jewellery. At the conclusion of the trial, the Acting District Judge did not make any decree either in favour of plaintiff or defendant. He found that the plaintiff owed the defendant a sum of Rs. 91, and he stated that had this money been brought into Court by the plaintiff he would have had no difficulty in framing his judgment so as not to affect the legal rights of the parties. "This however," he proceeded, "has not been done; accordingly I think the most "equitable course is to order the plaintiff to bring into

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"Court the sum of Rs. 91 within fourteen days, and the defendant to "bring in the jewellery into Court also within fourteen days, to abide "the further order and decree of this Court thereon respectively." No formal order was drawn up; but on the defendant's neglect to comply with this order the Acting District Judge, on his own motion, charged the defendant with contempt of Court, and found him guilty and sentenced him as before mentioned.

It appears to me that the order that was made was *ultra vires.* It was an order not asked for by plaintiff, and I do not understand how it came to be made. Of course in some cases, where a defendant admits the disputed property to be in his hands, the Court, in order to secure the preservation of the property, may order it to be brought into Court and kept *in medio* until the question as to who is entitled to it be determined; but in this case the trial had been held, the evidence of both parties had been heard, and the Judge was in a position to decide as to whether the claim of the plaintiff had been proved or not. If he thought that claim had been proved, he ought to have made a decree for the delivery of the property. If he thought that the plaintiff was indebted to the defendant, he might have made a cross decree in favour of the defendant. It seems to me that the order that was made was irregular, and that therefore the defendant ought not to have been sent to jail for disobedience of it.

A very serious question was raised in the course of the argument as to the effect of section 59 of Ordinance No. 1 of 1889 on the power of District Courts to deal with persons disobeying their orders, which, however, it is not necessary on the present occasion to decide.

WITHERS, J., agreed.

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1896. *January 28 and 31.*

DE SILVA *et al.* *v.* WEERASINGHE.

D. C., Kandy, 8,482.

Right of way over a public footpath—Evidence of special injury to plaintiff.

In an action raised by the plaintiffs as owners of a certain garden for a declaration that they are entitled to a right of way over a public footpath (leading from their garden to a street in Kandy), which the defendant had destroyed, and that the defendant should be ordered to reconstruct the same and pay plaintiffs a certain sum of money as damages arising from their inability to use the same,—

Held, that such action, in the absence of an allegation that the defendant had a land over which the footpath went, or the plaintiffs had a right of way over a land belonging to the defendant, could not be looked upon as a claim for a servitude on behalf of a dominant tenement, but should be treated as an action brought by a member of the public for obstructing a public pathway, and that, in the absence of proof of special injury to plaintiffs, such action was not maintainable.

THE judgment of Lawrie, J., is explicit as to the facts of the case.

Dornhorst appeared for defendant appellant.

Sampayo, for plaintiffs respondent.

Cur. adv. vult.

LAWRIE, J. 31st January, 1896. LAWRIE, J.—

The plaintiffs aver that they are the owners of Galahitiyawatta; that they have resided in a house on that land; that they were entitled to a right of way over a public footpath B1 to B2, to and from their house to a street in Kandy; that they have exercised the said right of way, and used the said public path uninterruptedly for more than ten years.

That about two and a half years before action brought the defendant destroyed a portion of this public path, by reason of which act of destruction the plaintiffs, their children, and servants, with cattle, have been prevented from using the said public path, &c., to the injury of the plaintiffs, for which they claim Rs. 200 damages.

Further, that the plaintiffs have suffered special damage by reason of their not being able (1) to carry and take along the said path to the town of Kandy the produce of the said land for sale; (2) to take their cattle from their house along the said path to town and back to the house; (3) to convey and bring manure from the town along the said path to the premises for the use of the said land; and they asked Rs. 250 special damages. The plaintiffs asked (1) for a declaration that they were entitled to a right of way over the said public path; (2) for a decree that the defendant,

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within a specified time to be named by the Court, should re-construct or repair the portions of the said path which have been destroyed by him, or to pay plaintiffs a sum of Rs. 50 to meet the costs of re-construction or repair ; (3) for damages, Rs. 450.

Now the learned District Judge has not granted the second remedy prayed for ; he has made no order as to re-construction, nor awarded any sum towards that object ; and the learned Judge has also refused to give any special damages. Against his judgment on these points the plaintiffs have not appealed. To my mind, the learned District Judge was wrong in holding that this was proved to be a public path. The proof seems to me quite insufficient. The plaintiffs' claim is to my mind ambiguous. I think that they did not make up their mind whether to claim this path as a servitude or easement, of which their land Galahitiyawatta is the dominant, and the defendant's land is the servient tenement, or whether to claim as members of the public against a wrongdoer.

The defendant is not alleged to have any land over which the path goes ; and as the complaint is not that they have a right of way over a certain land belonging to the defendant, in my opinion this action cannot be justly dealt with as an action for the declaration of a servitude. It must be regarded as an action by one of the public against a man, who, without right, has destroyed a public path. Now, in my opinion, such an action is not maintainable by a member of the public unless he avers and proves that he himself has sustained some injury for which damages are due to him.

The mere fact that a public way has been obstructed will not give to every quixotic member of the public a right to attack the wrongdoer and to get nominal damages from him, and yet, so far as I can see, this is what the District Judge has sustained, because he has found that the plaintiff has not placed any evidence before him which enables him to assess damages—still he has given them Rs. 30 damages. The plaintiffs' right to relief fails, if they have not proved that any produce grew on their land, which could have been taken for sale to Kandy ; if they failed to prove that they ever had a head of cattle which they could possibly have taken to and from Kandy ; if they failed to prove that they ever thought of bringing manure to their land, or that their land, in the old days, ever was manured ;—the only thing which remained was that the plaintiffs and their children and servants were prevented from using the path. It is proved that the path was destroyed, but *non constat* that that destruction did the plaintiffs any injury. They do not claim this as a way of necessity ; they

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1896.
January 28 and 31.

LAWRIE, J.

have other ways by which to reach and to leave their house. This is not said to be the nearest way or the most convenient way from their house to Kandy, so far as I can see ; and I am confirmed in this by the finding of the learned District Judge, that plaintiffs, as two of the public, have suffered no injury at all for which damages are due.

From the shape of their action, and from the proof adduced, they cannot succeed in having a decree in their favour as owners of a dominant tenement declaring this to be a servitude. They cannot succeed on the proof they have adduced in getting decree as members of the public, because they have failed to show such special injury as gives them a title to interfere. I would set aside and dismiss with costs.

WITHERS, J.

WITHERS, J.—

I agree in setting aside this judgment. I take this to be an action by the plaintiffs as a member of the public, who seeks to recover damages for being specially injured by the defendant's obstruction of way, a common highway.

I am unable to agree with the District Judge in his finding that this is a public pathway. Taking the finding to be correct, I think he is bound by the judgment of this Court reported at *p. 195* of *2 S. C. R.* A plaintiff under such circumstances cannot succeed, unless he proved that he has been specially damaged by the highway being obstructed.

He has disclosed no such special injury as the law understands by that term.

The appellant will have his costs.

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VANSANDEN *et al.* *v.* MACK *et al.*

1895.
October 9 and 15.

D. C., Colombo, 2,976.

Last will, construction of—"*The children of the testatrix and their descendants*"—Fidei commissum—*Tenancy in common—Ordinance No. 21 of 1844, § 20—intention of testatrix—Family arrangement.*

Per BONSER, C.J.—No special words are necessary to create a *fidei commissum*, but effect is given to it if it can be collected from any expressions in the instrument that it was the testator's intention to create it.

General rules for the interpretation of wills are often unsafe guides. The only true criterion is the intention of the testator, to be gathered from the will and the circumstances of the case.

Per BROWNE, A.J.—The expression "my children and their descendants" differs in nowise from "my children and my descendants."

Per WITHERS, J.—A direction in a last will that the children and their descendants should not sell or alienate the property devised is in itself a creation of a *fidei commissum*, and the children appointed heirs for the residue of the estate took such property subject to the *fidei commissum*.

If a thing is to be preserved intact and disintegrated for the benefit of coming generations, then the tenants for the time being, while the seal of the *fidei commissum* is still upon that thing, with possibility of succeeding beneficiaries, must be considered as tenants to whom the rule of *jus accrescendi* is applicable, in order to serve the express purpose for which the *fidei commissum* was created, and the operation of the Ordinance No. 21 of 1844, section 20, will be suspended till either there is no possibility of succession or till the term fixed for *fidei commissum* has expired.

Per CURIAM.—Whatever may have been the intention of the testator as to the creation of a *fidei commissum*, where the will has been construed by the parties as if the testator had impressed a *fidei commissum* on the property, and such construction has formed the basis of family arrangements for a long period, it should not be disturbed.

THE plaintiffs, as the surviving descendants of one Petronella Evekenel, prayed for a declaration of title to a certain house and grounds, upon the averment that she had devised the property by her last will to her sons Johannes and Isaac by her first husband Beckkenhoff and to her daughter Sarolomina by her second husband François, on the condition that they should not sell or alienate the same, but that it should be possessed by them and their descendants. Plaintiffs contended that as Johannes and Sarolomina had died without issue, they were entitled to the whole property as the children of Isaac Beckkenhoff.

They alleged further that in 1865 Anjou, the husband of Sarolomina, having claimed the entire premises, they and Frederick Beckkenhoff, as the children of Isaac Beckkenhoff, instituted the suit No. 45,398 in the District Court of Colombo against the said Anjou and obtained a decree in their favour in

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1895.
October 9 and 16.

1867, which declared them entitled to an undivided one-half of the premises; that thereafter the plaintiffs therein and Sarolomina possessed the same jointly; that Frederick Beckkenhoff died unmarried and intestate in 1882, from which date the 1st and 2nd plaintiffs possessed an undivided half and Sarolomina the remaining half; that Sarolomina died childless in 1892 leaving a last will made conjointly with her second husband Anjou, whereby they appointed the first and second defendants their executors; and that these defendants claiming title to the entire property, had ousted them from their share of possession.

The defendants denied that any *fidei commissum* was created under the will of Evekenel, or that upon Sarolomina's death without issue the whole property devolved on the plaintiffs, or that the decree in suit No. 45,398 bound Sarolomina. They further pleaded that Evekenel had no right to dispose of by her last will more than a half share of the premises; that the other half belonged to Sarolomina by right of inheritance from her father François, who died intestate after marrying Evekenel; that only a half share of the premises passed to the devisees under the will; that Sarolomina, one of the three devisees, was entitled to one-third of the half or one-sixth of the whole; that she was further entitled to an additional one-twelfth by inheritance from her brother Johannes; that all the shares aggregated nine-twelfths or three-fourths of the entire house; that Sarolomina and her second husband Anjou left a last will by which they devised the residue of their estate (including the three-fourths share in question) to certain persons who were entitled to the same; that the first and second defendants were executors appointed under that will; and that the third defendant was their tenant.

In the event of the Court holding adversely to this view, defendants contended that Sarolomina was entitled to at least an absolute half of the said premises.

The Acting District Judge (Mr. J. Grenier) gave judgment for plaintiffs as prayed.

The defendants appealed.

Dornhorst (with *Sampayo*), for defendant appellant.

Peiris (with *Van Langenberg* and *Bawa*), for plaintiffs respondent.

Cur. adv. vult.

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15th October, 1895. BONSER, C.J.—

This case arises on the will, made in 1825, of a Dutch lady who died in 1829.

At the date of her will she was possessed of a house in Colombo and was twice a widow. By her first husband she had living two children, Johannes and Isaac; and by her second husband one child, Sarolomina, who afterwards married one Anjou.

The testatrix, by her will, which was drawn by an illiterate Dutch notary, after giving some trifling gifts of jewellery and furniture to her daughter, proceeded as follows :—

"The testatrix further declares that her house No. 5, situated and "lying in Land street in the Pettah of Colombo, shall not sell "or alienate, but be possessed by her children and their descen-"dants." Proceeding to the institution of heirs, she declares to "nominate and institute her children, Johannes Simons and Isaac "Augustinus Beckkenhoff, procreated by her first marriage with Mr. "Christian Beckkenhoff, and Sarolomina Welhelmina François, by "her second marriage with Mr. Engelbert Otho William François, "to all the residue and remainder property whatsoever which she "shall leave behind, equally to be divided and possessed amongst "them without any molestation of any person whatsoever."

It appears that Johannes died in 1849 childless, but leaving a will, by which he demised all his property to his widow, who claimed to be entitled to one-third of the said house. This claim was resisted by the surviving brother and sister, but ultimately the claim, and a suit which had been instituted in the District Court of Colombo, were compromised by an agreement, whereby Isaac and Sarolomina granted to the widow the usufruct of a portion of the premises during her life, with a proviso that on her death it was to revert to them and their heirs and descendants.

In 1865 Isaac died, and the respondents are his children. Shortly after his death litigation ensued between the respondents and Sarolomina and her husband, which resulted in a decree being made, by consent, giving each party a half share in the house. It will be seen that on both these occasions the existence of a *fidei commissum* rendering the house inalienable was successfully asserted. Moreover, Sarolomina's husband afterwards became insolvent, and in his schedule of assets included the life rent, belonging to his wife, of one moiety of the said house, thus recognizing the *fidei commissum*.

In 1892 Sarolomina died a widow, without issue, leaving a will, which did not mention this property; and the appellants, her executors, entered into possession of the house, excluding the respondent from any share therein. Now, however, they limit

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1895. October 9 and 15.

BONSER, C.J.

their claim to a moiety. They claim Sarolomina's one-third and one-half of Johannes's one-third.

The respondents, on the other hand, claim the entirety of the premises, as being the only extent members of the class—" the " descendants of the children of the testatrix."

No special words are necessary to create a *fidei commissum*, but effect is given to a *fidei commissum* if it can be collected from any expressions in the instrument that it was the testator's intention to create it. (*2 Burge, 106.*)

That the prohibition against alienation created a *fidei commissum* is not disputed by Mr. Dornhorst, who argued the case for the appellants, but, as I understood him, he contends that the will created three independent *fidei commissa*, each of an undivided one-third share of the house in favour of each child and his descendants ; that when Johannes died without issue his share passed by his will to his widow, who, in ignorance of her rights, abandoned her share to Isaac and Sarolomina ; and that now Sarolomina is dead without issue, her one-third share, together with the one-half of Johannes's share, forms part of her estate, and passed to the appellants.

In my opinion this is not in accordance with the intention of the testatrix. Although the will is very badly expressed, yet I think that it sufficiently appears that the testatrix intended the house to be enjoyed as a whole by her three children and their descendants as long as the law allowed, that is, for four generations.

In these cases general rules are often unsafe guides, and the only true criterion is the intention of the testator to be gathered from the will and the circumstances. *Praesertim cum voluntas fideicommittentis potissimum spectari debeat, ac observari : sic ut generales illæ de fideicommissorum interpretatione regulæ sæpe quidem usum inveniant, sed et sæpe fallaces sint* (*Voet, XXXVI., 1, 72*).

The interpretation put upon the will by Mr. Dornhorst would destroy what I consider to have been the intention of the testatrix, that the property should be enjoyed by her children and their descendants as long as the rules of law permitted ; for in this case the result would be that at the end of the first generation only one-third of the property would have been possessed by the descendants of the testatrix's children.

We were referred to a case in *3 S. C. R. 158, Tillakaratne v. Abeyesekara*, but that case is distinguishable from the present case. There a division of the property was contemplated by the testatrix for she expressly directed it to be divided ; here the testatrix dealt with the house as an integral unit.

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In the view I take of this case, Ordinance No. 21 of 1844 does not apply, nor is there any question of *jus accrescendi*. The statement in *Voet XXXVI., 1, 29, ad fin* ("*fidei commissi petitio competit omnibus, qui ex familia æque propinqui sunt, aut ex repræsentatione pro æque propinquis habentur exclusis illis, qui remotiores sunt*") would seem to be applicable to the present case, if we substitute for family the phrase "the descendants of the children "of the testatrix."

But whether this construction be the true one or not, it has been acted upon for now nearly seventy years; it has formed the basis of family arrangements and compromises; and ought not, at this distance of time, to be disturbed.

The appeal will be dismissed with costs.

WITHERS, J.—

WITHERS, J.

This is a clumsily expressed will in regard to that portion of it which refers to the property in dispute.

What was the intention of the testatrix in regard to the disposition of the premises, and has that intention been given effect to in the will?

I think there can be little doubt that it was the intention of the testatrix to impress a *fidei commissum* on the property, in the interest of the three children and their descendants, for such time as the law might allow to be possessed by them, and no others.

The direction that the children and their descendants should not sell or alienate it, in itself created a *fidei commissum*, and in my opinion the children appointed heirs for the residue of the testator's estate took that property subject to the *fidei commissum*.

I further think that the property was to be kept as an indivisible trust.

But, whatever may have been the intention of the testatrix, it has been so clearly construed and acted upon by the parties interested for so long a time, that we cannot possibly disturb the arrangement.

It was clearly understood by the late Sarolomina and Isaac that the survivor should hold the entire premises for the purposes of the trust. This involved the operation of the *jus accrescendi*, whether that was or was not intended by the testatrix, and the plaintiff's descendants are clearly entitled to hold the entire premises for themselves and in trust for their descendants, if any, after them.

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1895. October 9 and 15.

WITHERS, J.

It was strenuously contended, however, by Mr. Dornhorst, that the tenure of the premises by Isaac and Sarolomina should be governed by the provisions of the Ordinance No. 21 of 1844, and he claimed a declaration that they were tenants in common of the premises in equal undivided shares. Even if that Ordinance has a retrospective operation, I do not think it applies to this case in the existing circumstances.

If one thing is to be preserved intact and disintegrated for the benefit of coming persons, then the tenants for the time being, while the seal of the *fidei commissum* is still upon that thing, with possibility of succeeding beneficiaries, must be considered as tenants to whom the rule of *jus accrescendi* is applicable, in order to serve the express purpose for which the *fidei commissum* was created, and the operation of the Ordinance will be suspended till either there is no possibility of succession, or till the term fixed for the *fidei commissum* has expired.

In this case, for instance, if the three children appointed fidei commissaries and fiduciaries for their children were presently alive, and had reached an age beyond all possibility of issue, or if Isaac and Sarolomina were the two surviving descendants in the fifth generation, then, in the absence of an express provision by the testatrix, that the three children in the first case or the surviving children in the fifth generation in the second case would hold the property as joint tenants with benefit of survivorship, the Ordinance, if retrospective, would operate to make the tenure one in equal undivided shares.

It is the constitution of the *fidei commissum* in this case which differentiates it from *Tillakaratne v. Abeyesekara* in *3 S. C. R. 77, 158*.

I still think that the Ordinance would apply (even when the term of the *fidei commissum* was subsisting) in all doubtful cases, so that a tenure would be deemed to be one in common for the benefit of each tenant's descendant, and not a joint tenure with a *jus accrescendi* to the survivors or survivor.

The appeal therefore, in my opinion, fails, and should be dismissed with costs.

BROWNE, A.J.

BROWNE, A. J.—

I have had the advantage of reading the draft judgments of my Lord the Chief Justice and my brother.

Concurring entirely in their views as to the creation of a valid *fidei commissum* and in their affirmance of the decree, I would add only the suggestion that were the provisions of section 20 of Ordinance No. 21 of 1844 applicable to this will of earlier date than

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the enactment, the creation of a *fidei commissum* such as this, in favour of a family, should be regarded as an express provision that the survivor should become entitled even to the extent (wherein I venture to differ from my brother) that the benefit of survivorship would enure to the very last taker of the fourth generation.

1895. *October 9 and 15.*

BROWNE, A.J.

As regards the intention of this testatrix, I regard her words, " my children and their descendants," as differing in nowise from " my children and my descendants."

In the absence of any intention of division of the estate, in the fact of its concerning only the one family house, and in its greater simplicity of provisions, however ungrammatically or ignorantly expressed, I regard this case as even a clearer indication of intention to create a *fidei commissum* in favour of the testatrix's family, than the case wherein our judgment is reported in *3 S. C. R. 158*.

THE QUEEN *v.* NANDUA *et al.*

1895 *December 31.*

D. C., Kandy (Criminal), 823.

Riot—Voluntarily causing hurt—Ceylon Penal Code, s. 67.

When five or more people assemble with the object of beating a particular person, and do beat him, they are guilty both of riot and voluntarily causing hurt; but inasmuch as the act of riot is made up of the offences of unlawful assembly and voluntarily causing hurt, which was the object of the assembly—

Held, that their case fell under section 67 of the Ceylon Penal Code, and that they should be punished for the principal offence of riot only.

Case of *Muniwala v. Davitha, Civ. Min.*, 11th December, 1895, disapproved.

THE facts of the case appear in the following judgment of the Supreme Court.

Dornhorst, for appellant.

Dias, *C.C.*, for respondent.

Cur. adv. vult.

31st December, 1895. WITHERS, J.—

WITHERS, J.

In this case nine persons were indicted before the District Judge of Kandy for the two offences, one of riot under section 144, Ceylon Penal Code, and the other of voluntarily causing hurt to Spencer Walter Gane under section 314, Ceylon Penal

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1895.
December 31.
WITHERS, J.

Code, at Holton estate, on the 27th day of August last. The District Judge found all the accused, except the third accused, guilty of both offences. The third accused, Yamanagedara Howadia, the District Judge has acquitted of both offences, and has discharged him.

The judgment was pronounced on the 3rd December, and the sentence awarded on the following day.

The first accused was sentenced to nine months' rigorous imprisonment for the offence of rioting and to three months for voluntarily causing hurt.

The second accused to six months for rioting and to two months for voluntarily causing hurt.

The ninth accused to four months for rioting and to two months for voluntarily causing hurt.

The fourth, fifth, sixth, seventh, and eighth were on the second day found to be " constructively guilty under section 146 of voluntarily causing hurt."

The District Judge thought it sufficient to pass one sentence on them for the two offences. This really makes a third offence, for on the previous day he had convicted them of rioting and voluntarily causing hurt.

The sixth accused was sentenced to three months' rigorous imprisonment because he took a more prominent part than the fourth, fifth, seventh, and eighth.

Mr. Dornhorst appeared for the accused appellant, and Mr. Crown Counsel Dias in support of the judgment.

At the close of the case I had no doubt in my own mind that most of the accused had been well convicted, at least of one of the offences, riot or voluntarily causing hurt.

Mr. Dornhorst, however, pressed on me a judgment of mine recently pronounced in the case of *Muniwala v. Davitha et al.* (498 P. C., Hambantota, 1557). In that case I made observations which implied that if some five or more people assembled together with the one object of assaulting a person, and they carry their purpose into effect, they are guilty of assault rather than of riot. I took time to consider that proposition, and after consideration I think it is not strictly accurate.

Having looked carefully again into our Penal Code, I think that according to that Code if five people or more assemble with the object of beating a particular person, and do beat him, they are guilty both of riot and of assault, but it is quite a different question whether they should have different punishments for these two offences.

I readily follow what I find appears to have been laid down by

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the Madras High Court as reported in Prinsep's Indian Criminal Procedure Code: "Where the charge is founded on one single "continuous transaction, the first thing to be ascertained is what "is the principal legal offence involved in the conduct of the "accused; what would subject him to the greatest amount of "punishment. That being ascertained should form the first head "of the charge; the object of adding others is not the accumulation "of punishment, but to provide against the event of the evidence "failing to establish the principal charges."

In this case clearly the principal offence was riot. Some of the accused assembled together with the sole object of assaulting Mr. Gane. They effected their purpose. Riot was thus the principal offence they committed. That act of riot again was made up of two other offences, unlawful assembly and voluntarily causing hurt, which was the object of the assembly. They therefore should only be punished for the principal offence of riot. This case comes clearly within the provisions of section 67 of our Penal Code.

Another point I took time to consider was the nature of the evidence against the fourth accused, Medakotuwe Belinda; fifth accused, Amunagedara Horatella; and eighth accused, Udugamagedara Pasumba.

I have carefully gone over the evidence a second time, and I think the evidence against them is of very much the same character as that against the third accused, and I think they ought to have the benefit of the doubt as to their being present on the occasion of the assault on Mr. Gane.

I therefore reverse the conviction against these appellants and acquit them. The sentences against the first, second, sixth, seventh, and ninth accused, for the offence of rioting, I affirm. The sentences against the first, second, and ninth, for voluntarily causing hurt, I set aside.

In the result the first accused, Pitakotuwa Nandua, is sentenced to nine months' rigorous imprisonment for rioting. The second accused, Pituwella Nandua, is sentenced to six months' rigorous imprisonment for rioting.

The sixth accused, Pitawatugedara Menika, is sentenced to three months' rigorous imprisonment for rioting.

The seventh accused, Pudunay Hawadiya, is sentenced to one month's imprisonment for rioting.

The ninth accused, Pallemaditta Horatella, is sentenced to four months' rigorous imprisonment for rioting.

The fourth, fifth, and eighth accused are acquitted.

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1895.
December 16.

QUEEN *v.* CARA *et al.*

D. C., Kalutara (Criminal), 650.

Criminal Procedure Code, s. 18—Sentence—Power of Court to give aggregate punishment—Distinct offences.

Under section 18 of the Criminal Procedure Code, it is competent for a District Court to pass sentences on an accused person aggregating four years.

But such a power should not be exercised except when the offences of which the accused is convicted are completely distinct in their character.

THE persons accused in this case were convicted of house-breaking by night in order to commit theft (under section 443) and of committing theft in the same building used as a human dwelling (under section 369 of the Penal Code), and each of the accused were sentenced "to undergo rigorous imprisonment for a period of two years for the first offence, and further to undergo rigorous imprisonment for a period of two years for the second offence, the several terms of imprisonment to commence immediately after the expiry of the first term; in all to undergo each four years' rigorous imprisonment."

On appeal preferred by the accused, *Dornhorst* (w th him *Jayawardana*) appeared for them.

The Supreme Court affirmed the conviction, but ordered the sentence passed on each of the appellants to be reduced from four to two years, for reasons given in the following judgment :—

WITHERS, J.

16th December, 1895. WITHERS, J.—

Notwithstanding the able way in which he put his appeal, Mr. Dornhorst failed to convince me that the verdict arrived at is a wrong one.

I reserved consideration of the sentences passed on the appellants.

The 18th section of the Criminal Procedure Code seems to me clearly to enact that, when a person is convicted at one trial of two or more distinct offences, the Court may sentence him for such offences to the several punishments prescribed therefor, which such Court is competent to inflict, provided that if the case is tried by a District or Pol'ce Court, the aggregate shall not exceed twice the amount of punishment which such Court in the exercise of its ordinary jurisdiction is competent to inflict.

Hence a District Court is competent in such a case to pass sentences aggregating four years.

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Such a power should not, however, be exercised except when the offences are completely distinct in their character. The distinct character of the offences will be best indicated by the intention of the offender. If, *e.g.*, the dominant intention is to injure the person, there should be but one punishment, though the transaction in its entirety discloses more than one injury to the same person. If the transaction, on the other hand, discloses an intention to commit a crime against the person as well as the property of the injured person, the punishments may and should be distinct. Let me illustrate what I mean. If A commits the offence of rape against B, and then and there commits theft from B's person, his conduct indicates the intention of committing two offences wholly distinct in character, and separate sentences would be appropriately passed upon him in such a case. Lust and greed are alike gratified.

1895.
December 16.
WITHERS, J.

In the present case, to use the language of the old Criminal Law, there was burglary and theft from a dwelling-house in one and the same transaction. The single intention as disclosed by the conduct of the appellants was to commit an offence against property. In consequence one sentence should have been passed, in my opinion. I therefore reduce the sentence against each of the appellants from four to two years' rigorous imprisonment.

In the Matter of the Insolvent Estate of JOHN RAYNOR MACQUINE PRESSLIE.

1895.
October 10.

D. C., Badulla, 86.

Insolvency—Assignee's report—Practice of tradesmen allowing credit to persons of slender means.

The District Court should, in all cases of insolvency, insist on having a report from the assignee as to the conduct and dealings of the insolvent before adjudicating on his application for a certificate.

Observations on the improper practice of tradesmen allowing credit to persons of slender means, and thus encouraging them to run up heavy bills which they have no prospect of paying.

THE facts of the case are stated in the judgment of his Lordship the Chief Justice.

Sampayo, for appellant.

Aserappa, for respondent.

10th October, 1895. BONSER, C.J.—

BONSER, C.J.

In this case the insolvent, Mr. Presslie, appears to have been the Superintendent of Warburton estate in Badulla, and was in the

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1895. October 10.

BONSER, C.J.

receipt of a salary, first of Rs. 50 and then of Rs. 60 a month, on which he was supposed to keep himself. On that salary he managed to run up bills with various tradesmen to a considerable amount. One of the principal creditors was Messrs. Walker & Greig, of Badulla, who are general storekeepers, and who allowed him to run up a bill for eatables and drinkables and other articles of over Rs. 600 in the course of a few months. Previously to that, he appears to have been in receipt of a larger salary of Rs. 140 a month, and during that time he ran up a bill with another storekeeper of Badulla of over Rs. 700. Whilst in receipt of this munificent salary of Rs. 50 a month, he also ran up an account with one Perera of over Rs. 100, with the Colombo Apothecaries' Company of over Rs. 200—for what, does not appear—and with Cargill & Co. and other persons for smaller sums. He was ultimately made insolvent on his own petition. Only two of his creditors proved: Walker & Greig and another creditor for over Rs. 700, one Packir Saibo. An assignee was appointed, but he has made no report. We consider that in all cases a District Court should insist on having a report from the assignee as to the conduct and dealings of the insolvent before adjudicating on his application for a certificate.

In this case the grant of a certificate was opposed by Messrs. Walker & Greig, on the ground that the insolvent had behaved with recklessness in contracting these debts—with such recklessness as to amount to dishonesty.

I must say that if the insolvent was reckless to the verge of dishonesty, he was aided and abetted by his opposing creditors, Messrs. Walker & Greig.

I have no sympathy with creditors who allow a man in receipt of a wretched salary like this to run up such a bill as this. If they lose their money they have only themselves to thank for it. But I think it is desirable that a District Court should not adjudicate on the question of a certificate without a report from the assignee.

Therefore, without going into the merits of the case at all, we direct that the order granting a certificate of the third class be discharged in order that the District Court may re-consider the application on fuller and better materials than it had before it when it made the order.

The insolvent will have protection until the application has been disposed of.

WITHERS, J.

WITHERS, J.—

I entirely concur in and endorse all the observations of my lord on the improper practice of tradesmen in allowing credit to persons of the slenderest means, and encouraging them to run up heavy bills which they have no present prospect of paying.

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SOYSA *v.* APPUHAMY.

1895. *October 23.*

Additional P. C., Ratnapura, 3,062.

Ordinance No. 11 of 1865, s. 7—Labourer—Contract of service—Quitting service without leave or reasonable cause—Finding of Police Magistrate.

In a prosecution under the Labour Ordinance of 1865 against a servant for quitting service without leave or reasonable cause, it is necessary that the Magistrate should, in the event of a conviction, state in his judgment the capacity in which the accused was employed in the complainant's service, so as to show that his quitting it without leave or reasonable cause constituted an offence against the Labour Ordinance.

Unless some definite term of service is expressed in a written contract for hire and service, it will be obnoxious to section 7 of Ordinance No. 11 of 1865, and the servant cannot be criminally punished under that Ordinance.

THIS case was brought up in revision on the application of the Attorney-General. The facts are sufficiently stated in the judgment of Mr. Justice Withers.

Layard, A.-G. The evidence recorded in this case does not disclose any offence. There was no formal charge. The complaint against the accused is as a labourer under a written contract of service. But the prosecution did not prove the special agreement. For some reason or other the contract has not been put forward. It may be outside the Labour Ordinance. In a criminal case the terms of a contract cannot be assumed in the absence of formal proof. The proceedings are otherwise irregular. The Police Magistrate does not record his reasons for the conclusions he arrived at.

Morgan, for the respondent. The proceedings must be admitted to be irregular. But the Police Magistrate's reason for finding the accused guilty is that he did not resume his service on the estate after his return from jail. He was bound to go back to the estate and leave it with due notice (*Hunt v. Muttan,* P. C. Ratnapura, 6,545, *4 S. C. C. 3*). (WITHERS, J.—The contract in question does not appear to bring the accused within criminal liability. BONSER, C.J.—What is the distinction between monthly wages and daily wages ?) The coolies on such estates are generally paid on the footing of daily wages earned. (BONSER, C.J.—Then they are day labourers.) I think that is the practice throughout the Island. (BONSER, C.J.—Then, if he does not work the whole month he is not liable to punishment.) As a rule they work about five days in a week. They have to work four days in a week, otherwise they will not receive the usual advance; and if the cooly attends muster every day, the master is bound to provide him with work. The written contract of service referred to was not

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1895. October 23.

proved. But I have it with me, and shall read it with Your Lordship's permission. (BONSER, C.J.—You may read it.)

The contract was read, but it did not appear to be within the purview of the Labour Ordinance.

WITHERS, J.

23rd October, 1895. WITHERS, J.—

The question for our decision in revision is whether the conviction of the petitioner in revision can stand.

The accused was convicted of quitting the service of the complainant, one J. F. Soyza, without leave or reasonable cause, in breach of section 11 of Ordinance No. 11 of 1865, and upon that conviction the accused was sentenced to a term of rigorous imprisonment for a "fortnight."

The Magistrate has not stated in his judgment, as he should do, the date on which the prisoner committed the alleged offence.

His judgment is further defective in not specifying the capacity in which the petitioner was employed in the complainant's service, so as to show that his quitting it without leave or reasonable cause constituted an offence against the Labour Ordinance.

As the evidence was read out by the Attorney-General (on whose application the case had been brought up in review), it transpired that the petitioner was bound to the complainant by a contract in writing, which, if produced, was not proved in the Court below.

Mr. Morgan, who appears on behalf of the complainant in these proceedings, has however read out to us the terms of the contract which, as a matter of fact, the petitioner did enter into with the complainant. Now we know what it was, it seems to us to be unnecessary to send these proceedings back to have the contract formally proved and put in evidence, because it does not come within the scope of the provisions of section 7 of Ordinance No. 11 of 1865.

That section enacts that—

No contract entered into in this Island for the hire and service of any servant or journeyman artificer for any period of time longer than one month shall be valid in law, so as to subject any party thereto to the provisions of this Ordinance for not performing the same, unless such contract shall be in writing, and shall clearly express the terms and conditions thereof, and shall be signed or acknowledged by the parties thereto in the presence of a Police Magistrate or a Justice of the Peace, or other person expressly authorized by the Governor, such Justice or other person not being himself the employer of such servant or journeyman artificer, or the agent of such employer. And it shall be the duty of such Police Magistrate, Justice of the Peace, or other authorized person to see that the contract is fully explained to the parties, and to certify on the contract that they fully understand the terms thereof, and are desirous to fulfil the same. And such contract, when produced in evidence, and having the certificate of the Police Magistrate, Justice of the Peace, or duly authorized person as

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aforesaid, shall be *primâ facie* evidence of the matters and things contained therein. And every such contract shall be executed in triplicate, and it shall be the duty of such Police Magistrate, or Justice of the Peace, or other authorized person as aforesaid, to give or cause to be given one copy thereof to the servant, and to send or cause to be sent, within ten days of the execution thereof, another copy thereof to the Police Magistrate of the district wherein such contract shall have been executed, and in default thereof such Magistrate or Justice shall be liable to a penalty of five pounds. And the said Police Magistrate is hereby required to preserve the said counterpart, and to allow any person who may be interested in the said contract to inspect the same. Provided always that no contract (excepting contracts made under the 8th section of this Ordinance) for the hire and service of any servant or journeyman artificer (whether made in Ceylon or in India as provided by the 9th section) shall be valid under the provisions of this Ordinance if made for a longer period of hire or service than three years.

Now, this clearly implies that some definite time must be expressed in a written contract for hire and service.

It is impossible to say at what time the contract in question may be determined—it may be determined in a week, or it may not be determined for several years—the object apparently being to keep the labourer on the estate until he has worked off a sum of money which has been advanced him by his employer.

It is the absence of any express limitation of a term of service which renders the present contract obnoxious to the 7th section of this Ordinance, so that the petitioner cannot be criminally punished for anything he may have done in violation of the provisions of that contract.

The employer may or may not have his civil remedy, but the Labour Ordinance does not permit him to criminally prosecute a servant who is bound to him under a contract of this description.

For these reasons the conviction should be set aside and the petitioner acquitted and discharged.

BONSER, C.J. BONSER, C.J.—I agree for the same reasons.

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1896.
March 4.

KUTTALAM CHETTY *v.* INA MUTTU.

P. C., Colombo, 41,035.

Criminal Procedure Code, s. 236—False and vexatious case—Case "instituted on complaint"—Case instituted on formal police report—Duty of police officers as to complaints made to them —Compensation—Crown costs.

Where a Police Magistrate takes proceedings on a formal written report made to him by a police officer under sub-section 2 of section 152 of the Criminal Procedure Code, and finds the complaint frivolous or vexatious, it is not open to him to condemn the party on whose information such written report was made either in compensation to the accused or in Crown costs.

A case "instituted on complaint" (referred to in section 236 of the Criminal Procedure Code) is a case instituted on a complaint made by a person to a Police Magistrate in terms of section 152 (1) of that Code, and does not mean a case instituted on a "formal written report" made by a police officer to the Magistrate, in terms of section 152 (2).

The reason why the order to pay compensation to the accused is restricted to cases "instituted on complaint" is because the Legislature thought that the police would not institute cases without having previously made due inquiry and satisfied themselves that there was a real, substantial case which ought to be dealt with by a Police Court. If the result of the inquiry made by the police is to leave room for doubt whether the case is not a frivolous one, they should refer the informant to the Police Court, and not take upon themselves the responsibility of instituting a case of the *bona fides* and merits of which they are not satisfied.

ON the 8th February, 1896, Police Sergeant Jansen informed the Police Court on the complaint of one Kuttalam Chetty that Ina Muttu, on the 4th February, 1896, "dishonestly "misappropriated to his own use a double bullock cart and three "coast bulls, all of the value of Rs. 70, and thereby committed an "offence punishable under section 389 of the Ceylon Penal Code." The Magistrate examined witnesses, including Kuttalam Chetty, and acquitted the accused and recorded as follows:—"The case "is false and vexatious. The complainant is ordered to pay Rs. 5 "Crown costs, in default fourteen days' imprisonment; and "further to pay Rs. 10 compensation to accused, in default "fourteen days' imprisonment (section 236, Ceylon Penal Code)."

Kuttalam Chetty was treated as the party referred to as "complainant" in the above order, and the fines were recovered from him.

He appealed from the order condemning him in compensation and Crown costs.

Tirunávukkarasu, for respondent, submitted that no appeal lay from the order as to Crown costs.

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Pereira, for appellant. The Code, it is true, enacts that from an order as to Crown costs there shall be no appeal. That means an order regularly made under sub-section 39, section 236. Where, however, a Magistrate, presuming to act under that sub-section, makes an order clearly *ultra vires*, such order is not protected by the provision against appeal. In the present case the Magistrate fined the wrong man. The Police Sergeant was liable to be condemned in Crown costs, and not the appellant. Then, as to the order for compensation, that order can only be made as a case instituted on complaint, meaning a case falling under sub-section 1 of section 152; but the present case came under sub-section 2. 1896. *March 4.*

Tirunávukkarasu heard contra.

4th March, 1896. BONSER, C.J.— BONSER, C.J.

In this case the appellant was ordered to pay Rs. 5 as Crown costs, in default fourteen days' imprisonment; and he was further ordered to pay Rs. 10 compensation to the accused, and in default fourteen days' imprisonment. These orders were made under section 236 of the Criminal Procedure Code, on the ground that the case was false and vexatious. Now, section 236 only applies to cases "instituted on complaint," and therefore we have to find out what is the meaning of a case instituted on complaint.

If we refer to section 152 of the Code, it will be seen that there are several ways of instituting proceedings in a Police Court. The first is on a complaint being made by any person to a Police Court that an offence has been committed over which the Court has jurisdiction; the second is, on a formal written report being made to a Police Court by a police officer to the like effect. Complaint is defined in the interpretation clause (section 3 *a*) to mean "the "allegation made orally or in writing to a Police Magistrate with a "view to his taking action under the Code that some person, whether "known or unknown, has committed an offence." Was this present case instituted on a complaint? The appellant did not go to the Police Court to make any allegation, either orally or in writing, to a Police Magistrate. What happened was this. He went to the Slave Island police station and told his story to the police sergeant on duty, charging the accused with an offence within the jurisdiction of the Police Court of Colombo. The sergeant did not refer him to the Police Court of Colombo, as he might have done but he adopted the charge made by the appellant and made a formal written report to the Colombo Police Court. It is clear from this that the

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1896.
March 4.

BONSER, C.J.

prosecution is not one instituted on a complaint, but that it was a prosecution instituted on a formal written report by a police sergeant. That being so, the Police Magistrate had no jurisdiction to order the appellant to make compensation to the accused.

Then, as to Crown costs, the 3rd sub-section of section 236 provides that " if in any case inquired into or tried before a Police Magistrate " under this chapter the complaint be not proceeded with within " such time as the Police Magistrate may deem reasonable, or if " the complaint is declared by the Police Magistrate to have been " frivolous or vexatious, it shall be lawful for such Police Magistrate " to make an order for the complainant to pay by way of Crown " costs a sum not exceeding Rs. 5," &c.

Now, we have seen already that this appellant made no complaint but that the prosecution was commenced on the formal written report of the police officer. If anybody was the complainant, it was the police sergeant; and if anybody should have been called upon to pay costs, it was the police sergeant, who rushed into Court with a case which the Magistrate declared to be frivolous and vexatious. The reason why the order to pay compensation to accused is restricted to cases instituted on complaint, is obvious. It was not thought necessary to deal with cases instituted on formal police reports, because it was assumed that the police would not institute cases without having previously made due inquiry and satisfied themselves that there was a real, substantial case which ought to be dealt with by a Police Court. If the result of the inquiry made by the police is to leave room for doubt, whether the case is not a frivolous one, they should refer the informant to the Police Court, and not take upon themselves the responsibility of instituting a case of the *bona fides* and merits of which they are not satisfied.

The order must be discharged.

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PIERIS APPUHAMI *v.* BOTEJU.

1895.
June 28 and July 19.

D. C., Colombo, C/2,482.

Ordinance 5 of 1877, ss. 31, 32—Certificate of title—Effect thereof—Setting aside such certificate—Necessity for entry of name of administrator instead of his intestate—Ordinance No. 14 of 1891, s. 26.

The object of a certificate of title granted under section 31 of Ordinance No. 5 of 1877 is to make it, unless and until it is impeached by an action under section 32 thereof, conclusive evidence of the title of the holder of such certificate to the land referred to therein; and the certificate is a bar to the assertion by any one of any claim to such land, which arose or accrued prior to the date of the certificate, and which might have been registered; and it is a bar to the claims of persons as well in as out of possession of the premises.

Any one seeking to set aside such certificate need not resort to a separate action, but that object may be gained by means of a claim in reconvention under section 32 of the Ordinance, in an action already filed against him.

Every administrator should get himself placed on the register kept under Ordinance No. 5 of 1877, as required by section 26 of Ordinance No. 14 of 1891, in place of his intestate, and his failure to do so will, under section 31 of Ordinance No. 5 of 1877, operate as a bar to any claim by him as administrator.

Cassim v. Marikar (1 S. C. R. 185) questioned.

THE facts of the case are set forth in the judgment of his Lordship the Chief Justice. It was argued in appeal on 28th June, 1895.

Dornhorst, for appellant.

Pereira, for respondent.

Cur. adv. vult.

19th July, 1895. BONSER, C.J.—

In this case we have to determine the effect of a certificate of title given under Ordinance No. 5 of 1877.

The plaintiff, who is the holder of a certificate of title of the second class to 3-28ths of a certain field, sues the defendant, alleging that he has been ousted therefrom, and prays for a declaration that he is the owner, and that he may be placed in possession of the share, and for damages.

The defendant, by his answer, alleges title in himself. He says that the plaintiff derives title from his father, Johanis Pieris, by inheritance, and that such title was and is a defeasible title, subject to any disposition of the said lands to be made by the duly appointed legal representative of the said Johanis Pieris.

He further alleges that Johanis Pieris died intestate on the 6th April, 1888, and that Misso, who was appointed administrator, sold and on the 16th of June, 1892, conveyed to the defendant 25-28ths

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1895.
June 28 and July 19.
———
BONSER, C.J.

of the said land, being all the interest of the said Johanis Pieris therein, and has claimed in reconvention that, in terms of section 32 of Ordinance No. 5 of 1877, he should be declared the lawful owner of the share as against the plaintiff. It appears that Misso was appointed administrator on the 2nd January, 1891, and the certificate dated the 10th March, 1892, states that the plaintiff was registered as owner on the 5th October, 1891.

The Acting District Judge gave judgment for the plaintiff for possession only, and the defendant has appealed.

The question is, what is the effect of registration ?

The 31st section of the Ordinance provides that " every certificate " of ownership shall have the effect of absolutely barring all claims " to the land therein mentioned, or to any right or interest thereto " or therein which shall have arisen or accrued prior to the date of " such certificate, and which might have been registered under the " provisions of this Ordinance, but which at the date of such " certificate had not been so registered, save and except as is " excepted by the following section." The following section provides that persons having or claiming to have any right, title, or interest in or to any land against the holder of a certificate of the second class shall be entitled to prosecute their claim by action within four years of the date of the certificate, and that, if such action be decided against the holder of the certificate and in favour of any party, that party shall be entitled to have a certificate, but that no such action shall prevent any claims being barred, unless written notice of such action shall be previously given to the registrar.

Section 35 provides that the holder of a certificate of the second class, if within four years from its date the registrar has received no notice of action, shall be entitled to a certificate of the first class.

In this case the defendant had got into possession of the land, and the plaintiff seeks to eject him on proof of his own title.

It was argued on behalf of the defendant that section 31 only barred claims of persons out of possession, and did not apply to a case like the present, where the claimant had managed to get into possession ; but this, in my opinion, is not a fair reading of the section. Having regard to the inquiries which have to be made, and the notices which have to be given before the certificates of title are granted, and to the fact that the Ordinance contemplates a sort of judicial settlement of all claims within the district in which it is brought into force, I am of opinion that the intention was to make the certificate, unless and until it was impeached by an action brought under section 32, conclusive evidence of the title of the holder, and to prevent any claim being asserted in any

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1895. June 28 and July 19. — BONSER, C.J.

way to the land which arose or accrued prior to the date of the certificate, and which might have been registered. The defendant claims by the conveyance from the administrator, Misso, of the 6th June, 1892. Then the question arises,—had Misso, at the date of the certificate, such a right or interest in the land as might have been registered under the Ordinance ?

The right of an administrator in respect of land has been much discussed.

It was suggested in a recent case that his position with regard to land differs altogether from that of an English administrator with regard to his intestate's chattels real, and that he has only a limited estate in them—an estate sufficient for administration and limited thereto ; and it was said that, subject to the exercise of that power, the land devolves on the heirs direct, not as in England through the medium of the administrator (*Cassim v. Marikar, 1 S. C. R. 185*). For my own part, I cannot understand the nature of such a limited estate. I know of nothing like it in English law.

But whether that view be correct or incorrect, it can hardly be maintained since Ordinance No. 8 of 1863, that an administrator has not such an interest in his intestate's lands as is capable of registration.

Section 38 of that Ordinance requires every grant of administration effecting any land to be registered.

More recently Ordinance No. 14 of 1891, section 16, specially requires every grant of administration affecting any land to be registered in the books kept under Ordinance No. 5 of 1877, and section 26 of the same Ordinance provides that " on the death of a " registered owner, all lands belonging to him shall remain in his " name until probate or administration of his estate shall have been " granted, whereupon, and upon a written application on that " behalf, the name of the executor or administrator shall be regis- " tered in the books until a partition, transfer, or alienation of " the land shall have been effected, whereupon such partition, " transfer, or alienation shall be registered."

These provisions do not appear to have been brought to the notice of the learned Judges who decided *Cassim v. Marikar.*

It was the duty, therefore, of the administrator to get himself placed on the register in the stead of his intestate.

As he did not do this, his claim was barred under section 31 by the plaintiff's certificate of ownership, and the defendant who claims through him can be in no better position.

But the defendant has claimed in reconvention the benefit of section 32 of the Ordinance No. 5 of 1877. It was suggested in

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1895.
June 28 and July 19.

BONSER, C.J.

argument that the certificate could only be set aside in an independent action, but I am of opinion that this is not so, and that it is competent for a defendant to do as this defendant has done. But before the action or claim in reconvention can be of any avail, notice must be given to the registrar. The word "previously" cannot mean "previously to action brought," for in section 35 the notice is referred to as being "notice of an action having been "commenced." The words "unless written notice of such action shall have been previously given to the registrar" mean "unless and "until written notice of such action shall have been given to the "registrar."

If the registrar has no notice of any action to set aside the second class certificate before four years have elapsed, he will proceed to give the holder a first class certificate. In my opinion, therefore, it not having been proved that notice of this claim in reconvention had been given to the registrar before the date of trial, the plaintiff was entitled to a decree in his favour.

Under all the circumstances, however, I think that the proper order to make in this appeal will be to send the case back to the District Court with directions to try the cross claim. If the defendant proves a good title and notice of action given to the registrar, he will be entitled to succeed, but he must pay the costs of the action in any event, and the costs of this appeal.

BROWNE, A.J.—I agree.

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VELAPPA CHETTY *v.* MEYDIN.

1895. *December 6, 10, and 16.*

D. C., Chilaw, 1,258.

*Procedure—Motion to take plaint off the file—Action raised by attorney of plaintiff—power of attorney not duly stamped at time of filing action—Defect cured on the day such motion was made—*Bonâ fides *of agent—Stamp Ordinance No. 3 of 1890, s. 31—Civil Procedure Code, s. 25—Action on promissory note—Right to demand particulars of admitted payments.*

Where defendant moved that plaint be taken off the file, as the agent who brought the action in the name of his principal did not appear to be authorized by a properly stamped power of attorney, and on the day of the discussion of the motion the defect was cured,—

Held, that it was wrong to order the plaint to be taken off the file and restored again to it as from the date on which the defect was cured, inasmuch as the Ordinance No. 3 of 1890, section 31, rendered such powers valid as from the date of its execution, and the agent seemed to act *bonâ fide*.

In an action on a promissory note it is not usual to deliver particulars of payments admitted by plaintiff, where the note does not appear *ex facie* to be barred.

THE circumstances under which the plaintiff appealed in this case are fully stated in the judgment of the Supreme Court.

The argument took place on the 6th and 10th December, 1895.

Layard, A.-G. (with him *Sampayo*), for appellant.

Dornhorst and *Jayawardana*, for respondent.

Cur. adv. vult.

16th December, 1895. WITHERS, J.—

Two orders are appealed from in this case. The more important one is that of the 17th October last, directing " the plaint to be " taken off the file and again restored as from this date, plaintiff " bearing all costs so far incurred."

This order was made under the following circumstances :—

On the 15th August an action was instituted against the defendant respondent on his promissory note dated the 19th day of September, 1889, for Rs. 1,000 and interest.

It was instituted by the presentment of a plaint in the name of Kolentha Velan Chetty (one of the payees of the note) by his attorney Velappa Chetty.

The plaint was entertained and filed. It was duly stamped, and it contained the requisite particulars (except the place of residence of the plaintiff, which was afterwards supplied). It was presented by a proctor on the plaintiff's behalf, and signed by the proctor.

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1895. December 6, 10, and 16.

WITHERS, J.

A copy of the plaintiff's agent's power, certified by a proctor, was filed with the plaint, at the foot of which it is noted as a document produced with the plaint.

Summons was issued for the defendant to appear and answer on the 3rd October. The defendant by his proctor appeared the previous day and called for the original power. He also moved that the plaint should be returned for amendment, the name of the plaintiff's place of residence not being mentioned in the plaint.

This motion was discussed on the 3rd, and the plaint was returned for amendment, the 10th October being appointed (I suppose) for the answer.

On that day, however, no answer was put in, but a motion was apparently made (though I can find no memorandum in writing of it) for further time to file answer. The entry in the journal is: "Counsel present; time to file answer allowed till plaintiff gives "details of payments admitted by him," which is followed by a formal order.

(This is the *other* order appealed from, and I shall deal with it presently.)

On the 14th October defendant's proctor steps in with another motion that the plaint be taken off the file, with costs to be paid by the plaintiff's agent, on the ground that the original power of attorney executed in India was not duly stamped according to the requirements of the local statute.

The document was in fact at the time not duly stamped for use in this Colony, but by the 17th October it was duly stamped.

So rectified it was produced to the Court that day, and then the Court made the order first referred to, namely, that the plaint be taken off the file and restored as from the 17th, and that plaintiff do bear all costs incurred so far.

The Judge thought the plaint bad on account of the defect in the power of attorney on the date of presentation. So he said in effect this:—Had I known the imperfection of the power of attorney under which the plaint was presented and filed, I should have rejected it. I do now what I should have done then. I put matters in *statu quo*. I will now entertain it as the power of attorney is effectual for use in the Colony, but the action must be considered as instituted from this date, the 17th October.

Was the Judge right in making this order?

Mr. Attorney-General argued that he was not.

The 31st section of the Stamp Ordinance, No. 3 of 1890, rendered the power of attorney valid as from the date of execution. It was consequently valid when the plaint was presented on the

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15th August. Hence the Judge had no power to reject the plaint on the 17th October, and so alter the date of institution of the action. He distinguished it from the Badulla case (72, D. C., Badulla, 30th May, 1895), where the plaint was returned for amendment because there the defect was in the constitution of the plaintiff's case.

There the plaintiff had claimed a right which he had not valued (a most requisite particular), whether regard be had to the stamp to be imposed on the pleading or to the interest of the defendant, who is entitled to know what value his opponent puts on a right he claimed.

That case could not go on till the plaint was amended in that particular. In the Badulla case the defect was a substantive one. In this an adjective one. We were pressed by Mr. Dornhorst to follow the principle in that case.

Had the Judge known the power of attorney to be ineffectual for local use for want of being stamped according to local law, he (it is conceded) would not have accepted the plaint at all. Therefore he can only entertain it when the document authorizing the institution of the action is put in order.

The Code does not provide for a case of the kind. The plaint could not well be returned for amendment, for the power was no part of the pleadings. It could only be rejected as unauthorized by a duly stamped power.

But if, after allowing the plaint to be filed, would the Judge have necessarily rejected it on discovering that the power of attorney was not duly stamped? He would not have received it if he had known of the defect, but, having entertained the plaint, would he have necessarily rejected it *proprio motu* on discovering the defect?

I think it would depend on the circumstances of the case. If the person presenting the plaint was not *bonâ fide* acting as the agent of the principal under the defective power, he would reject it.

But might he not, if the proceedings are otherwise in order, say: I will not let summons go out, or the defendant shall not be required to answer unless within a given time the document is put in order; and if this is not done within the time fixed I shall reject the plaint altogether.

It has not been usual, so far as I can find, to order a pleading to be "taken off the file" when the proceedings are unauthorized. In the English Equity cases an opportunity is given to perfect the authority, if possible.

Mr. Dornhorst laid special stress on the 25th section of the Civil Procedure Code, which enacted that when a recognized agent

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1895.
December 6, 10, and 16.
WITHERS, J.

presents his plaint he shall file with it the original power of attorney or a properly certified copy of it. He did not do so here, it was urged, because his copy was but waste paper.

Still it was a certified copy, and he did produce it with the plaint, and by the backward operation of the 31st section of Ordinance No. 3 of 1890 it was rendered good at the date of presentation.

It may be, as it is here, of great importance to a plaintiff what the date of instituting his action is. Even if the Judge had a discretion to do as he has done, I think it was not well exercised. The agent was acting in good faith all through for the plaintiff, his principal. He instituted the plaint as his agent, and his authority, if suspended by the defect of his stamped document, was rendered valid by the defect having been cured as from the date of his written authority.

The course taken by the Judge was to cause a fresh action to be instituted on the 17th October, and to dismiss the old plaint.

The conclusion I come to is that this course was not warranted by the circumstances of the case, and I would reverse the order.

The order to adjourn the answer till delivery of particulars as to the alleged payment of interest was wrong. It is not usual to deliver particulars in actions on promissory notes. The allegation that interest had been paid was not material to the plaint as instituted in August. It would be very material if the plaint had been instituted on the 17th October, for the note sued on would be barred on the face of it.

Both orders should, in my opinion, be reversed with costs.

The defendant should be required to answer within one week of the record being received by the lower Court.

BROWNE, A.J.—

I quite agree with my brother's view that the particular action to be taken, or order made in each case must depend upon the special facts of the proceedings in that action. Very possibly had the defendant here called for inspection of the power of attorney ere he moved for details of payments, or took any steps whatever in the action, he would have succeeded in having had the plaint rejected as having been improperly presented when there was no authority of existing local validity, and improperly received by reason of such unknown defect. He had all the more occasion to make such a motion in that, according to the journal entry, not even the copy of the power was filed with the plaint, although the schedule to the plaint states it was produced with the plaint.

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He, however, both called for particulars, and moved only that the plaint be returned for amendment. The result of his action was that plaintiff was enabled to produce—first the copy, and subsequently the original; and even before he exhibited the latter to have it stamped as soon as the absence of the Ceylon stamp was brought to his notice by the surmise of the defence that there was this defect. Defendant has so facilitated all this being done that I regard the position of affairs here as analogous to that contemplated by section 34 of Ordinance No. 3 of 1890, and that the learned District Judge, had the power been still unstamped in Ceylon when produced, should have ordered only a stay of the proceedings until it should be stamped.

A fortiori, therefore, as it had been stamped ere he had to make order on the motion of the 14th October, he should have refused the motion, but might have allowed defendant his costs thereof if the latter had been duly diligent and had acted in no spirit of mere delay or evasion of liability.

I agree in the proposed order.

PIERIS *v.* LIVERA.

1894. *December 13 and 20.*

P. C., Colombo, 33,867.

Arrack flavoured by drugs and spices—Ordinance No. 10 of 1844, s. 37, and Ordinance No. 13 of 1891, s. 10—Removal without permit.

The removal, without permit, of arrack which has been so highly impregnated or flavoured by drugs or spices that a distillation did not deprive the compound of their taste and flvour, and which was not proved as useful for medicinal purposes only, is punishable under Ordinance No. 13 of 1891, section 10, and Ordinance No. 10 of 1844, section 37.

THE accused in this case was convicted of the offence of removing 7½ gallons of arrack from one place to another without a permit, in breach of section 10 of Ordinance No. 13 of 1891 and section 37 of Ordinance No. 10 of 1844.

The defence set up was that no permit was required for medicated arrack.

The Police Magistrate's judgment was as follows :—

" In the present case the analysis proves that the compound in " question was strong arrack in which various bitter and aromatic " drugs had been steeped. There was no chemical change in the " arrack, and Dr. Fernando says the mixture is perfectly fit to " drink. It would apparently fall more under the description of

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1894. *December 13 and 20.* “ liquor mentioned in P. C., Kalutara, 62,334 (*3 S. C. C. 44, 45*), “ which was held to require a permit . . . . To allow such a “ compound to escape the provisions of the Ordinance regulating “ the removal of arrack would have the effect of spreading drunken- “ ness widely among the people.”

He sentenced the accused to a fine of Rs. 50, and ordered the confiscation of the arrack seized.

On appeal, *Wendt* appeared for the accused, and *Dornhorst* for the complainant (the peon of the arrack farm of Colombo).

Cur. adv. vult.

The conviction and sentence were affirmed in the following judgment of the Supreme Court :—

20th December, 1894. BROWNE, A.J.—

Accepting as true the evidence of the compounder of the liquor seized in this case, I find it is prepared by putting ordinary arrack distilled from the produce of the cocoanut palm, and purchased from the renter's godown, into a pot, steeping therein sixty kinds of herb for fifteen days, then distilling off the contents ; and next infusing in the re-distilled product certain powders, as gallnut, for seven days, and then straining them off. The result thereof, according to the compounder, is that the original quantity in the pot is reduced by one-half, and is much stronger ; and according to the public analyst that it was stronger than the best arrack, the percentages being, pure spirit 44·5 per cent., water 54·5 per cent., drugs about 1 per cent., the drugs being held in solution. No chemical change or change of alcoholic power was effected in the arrack by the introduction of the drugs, which could be separated only by distillation.

The liquor, however, did not taste or smell like arrack, but like a bitter alcoholic preparation. He re-distilled it, and it then smelt distinctly of arrack, and tasted of arrack flavoured with aromatic drugs, which were volatile, and were distilled with the liquor and not separated by this re-distillation, but could have been separated by repeated distillation.

This evidence has failed to show me that this compound was new, and substantially different from arrack. It is not shown that in its preparation there were other substances, the solution whereof or the distillation wherefrom would add to the original arrack consisting of so much spirit and so much water, such other ingredients as would make a new compound so essentially different.

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The result was only arrack so highly impregnated or flavoured by the drugs or spices, which in the inception of this process had been steeped in it, and blent with it by distillation of the arrack after their infusion, that one re-distillation thereafter did not deprive the compound of their taste and flavour.

1894. *December 13 and 20.*

BROWNE, A.J.

There is no proof that the compound was noxious, or even unpalatable, or could be used for medicinal purposes only, and the case therefore does not fall within such possible exceptions as were made in *3 S. C. C. 78.*

Affirmed.

UKKURALA *v.* DAVID SINHO.

1895. *December 4 and 9.*

P. C., Chilaw, 8,973.

Ordinance No. 22 of 1890, s. 228—Discharge of accused upon absence of complainant—Illegality of subsequent trial and conviction.

In a case triable summarily, after once discharging the accused owing to the absence of the complainant, it is not competent for the Police Magistrate, under section 228 of Ordinance No. 22 of 1890, to re-summon him, and after evidence heard to convict him.

The original discharge should be treated as an acquittal, and once acquitted he could not be tried again.

ON appeal against a conviction, under the circumstances fully set forth in the judgment of the Supreme Court,—

Van Langenberg (with *Jayawardena*) appeared for appellant.

9th December, 1895. WITHERS, J.—

The conviction of the appellant of the offence of criminal trespass and theft of a bull must be quashed not because the verdict is wrong, but because the trial is fatally irregular.

The prosecution charges the appellant with these offences on the 23rd August last, in a written complaint, which the Magistrate entertained.

The accused was before the Court when the complaint was received and the particulars were explained to him. He denied the charge, made an explanation, and claimed to be tried.

The 19th of the month following was appointed the day of trial, and the accused entered into a recognizance to appear on that day. He appeared on that day, but the complainant did not.

The entry in the journal on that day, as signed by the Magistrate, is as follows :—" Complainant absent ; accused present. Accused " discharged ; complainant fined Rs. 5, Crown costs, for not proceed- " ing with case. For October 7th."

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1895. *December 4 and 9.* — WITHERS, J.

Next day, it seems, the complainant came forward and excused his absence on the previous day, for the Magistrate remitted the fine and directed summons to the accused requiring his attendance at the trial deferred to the 17th October.

Now this, being a case on complaint of an offence summarily triable by the Magistrate, came strictly within the purview of section 228 of Ordinance No. 22 of 1890, which enacts: "If the "summons has been issued on complaint, and upon the date "appointed for the appearance of the accused, or any day subse-"quent thereto, to which the hearing may be adjourned, the "complainant does not appear, the Police Magistrate shall, notwith-"standing anything hereinbefore contained, acquit the accused, "unless for some reason he thinks proper to adjourn the hearing "of the case to some other day."

The Magistrate had only the alternative open to him of acquitting the accused, or adjourning the hearing of the case to some other day for some reason he thought proper.

He did not adjourn the case that day, but discharged the accused seeing no reason to adjourn the hearing of the case to some other day. He should have acquitted the accused, and I am bound to act as if the order which the law required had been made, and to treat the discharge as an acquittal. Once acquitted, the appellant could not be tried again, and hence this conviction cannot stand.

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SAXTON *v.* ANDI *et al.*

1895. *November 28.*

P. C., Mátalé, 9,860.

Appealable order—Criminal Procedure Code, ss. 414, 426—Order made by Police Court under Ordinance No. 6 of 1891—Appeal to enhance punishment—Power of Supreme Court to enhance in appeal sentence passed.

Per WITHERS, J.—No appeal lies from an order of the Police Court to have a greater punishment inflicted than the Magistrate has passed. And the Supreme Court has no power in appeal to enhance such punishment.

THE facts connected with this appeal are set forth in the judgment of the Supreme Court.

Templer, A. S.-G., for appellant.

28th November, 1895. WITHERS, J.—

In this case the Magistrate has convicted two persons, one of the offence of giving false evidence under section 180 of the Ceylon Penal Code, and the other of aiding and abetting him in that offence.

No previous conviction having been proved against either of the accused, the Magistrate thought it a proper case to deal with under the provisions of the Ordinance No. 6 of 1891, and instead of sentencing either of the accused at once to punishment, he has directed them to be released on their entering into a recognizance to appear and receive sentence when called upon at any time during the period of six months, and in the meantime to keep the peace and be of good behaviour.

The prosecutor has appealed from the order of the Magistrate on the ground that the judicial discretion has not been properly exercised.

Mr. Templer, Acting Solicitor-General, who appeared to support the appeal, thought it proper to ask for my opinion, whether this is an appealable order. The object of the appeal is to have the sentence enhanced, and the question is, whether any one can appeal from an order of the Police Court to have a greater punishment inflicted than the Magistrate has thought proper to impose.

My present opinion is that such an appeal does not lie. The 414th section of the Criminal Procedure Code no doubt uses words which might be construed to include the alteration of a lesser sentence to a longer one. But that is not the view which I am at present prepared to take of it. I think I have said before, and

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1895.
November 28.
WITHERS, J.

sitting alone I am prepared to repeat it, that if the Legislature had intended that this Court should have jurisdiction to pass a greater sentence than that passed in the Court below, that power would have been given in the clearest possible terms. The Indian Code of 1872, section 280, used these words :—" The Appeal Court, after " perusing the proceedings of the lower Court, and after hearing the " appellant......may alter or reverse the finding and sentence " or order of such Court, and may, if it see reason to do so, enhance " any punishment that has been awarded."

There the power is given in clear and express terms, and such terms I find wanting in our Procedure Code.

I must not omit to take notice of section 426 of the Criminal Procedure Code, which enacts that the Supreme Court in revision may call for a case for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed thereon, but the Supreme Court in revision may only pass such sentence or order which it might have made had the case been brought before it in due course of appeal instead of by way of revision.

Hence, if I brought this order up in revision, I do not see how I can interfere with the sentence so as to enhance it, even if I thought fit to do so, on which I offer no opinion. For these reasons I dismiss the appeal.

1896.
January 24 and 31.

MEERA SAIBO *v.* SAMARANAYAKA *et al.*

D. C., Kandy, 94,630.

Writ of execution against property—Commitment of judgment-debtor—Civil Procedure Code, ss. 224, 337, 347—Fatal irregularities.

Where plaintiff petitioned in terms of section 347 of the Civil Procedure Code, after several years had elapsed between the date of the decree in his favour and the application for its execution, but suppressed the facts that he had made previous applications for execution of the decree and levies had been made on his writ, and, nevertheless, his application was allowed,—

Held, that, in the absence of any evidence to satisfy the Court, as provided in section 337 of the Code, that in the last preceding application due diligence had been used to procure complete satisfaction of the decree, or that execution was stayed at the request of the judgment-debtor, leave to execute the decree should not have been granted.

Writ against property having issued, and the Fiscal having made return thereto that the judgment-debtors neither complied with his requirement to pay nor pointed out property for seizure, plaintiff moved for and obtained a warrant for the arrest of the judgment-debtor, and had him arrested and committed to prison.

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Held that, as the order allowing writ against property had *improvide emanavit*, the writ and the return thereto was unsound, as also the warrant of arrest and the commitment of the defendant to prison.

1896. January 21 and 31.

De Silva v. Sella Umma, 2 S. C. R., 155, explained.

THIS was an appeal from an order made by the District Judge of Kandy on the 9th December, 1895, committing to civil imprisonment the appellant who had been arrested under a warrant against person in execution of a decree obtained against him on the 27th September, 1884.

The facts of the case are fully set forth in the judgments given below :—

Wendt, for appellant.

Dornhorst, for respondent.

Cur. adv. vult.

WITHERS, J.—

On the 27th September, 1884, the appellant and another of the same name were decreed jointly and severally liable to pay the plaintiff a sum of Rs. 256 with interest till payment in full and costs.

Writ against property issued thereupon, and on the 11th November, 1884, two lands were sold, one for Rs. 46, bought by an outsider, and one for Rs. 20, bought by the plaintiff, who was fortunate enough to secure for Rs. 20 a land valued by the Fiscal's officer at Rs. 400, and for this he obtained an order of credit.

On the 11th March, 1885, writ against property was allowed to re-issue, accompanied with writ against person, but writ against property was not taken out till the 6th August following, and no writ against person was taken out at all.

No further steps towards execution was taken till the 22nd March, 1889, when plaintiff took out a *rule nisi* on the judgment-debtor to show cause why judgment should not be revived to recover the balance.

Here the plaintiff stopped and waited till the 4th May, 1891, when he applied for execution of the decree, of which notice was ordered to issue to the defendants, and the 26th May, 1891, was fixed for the hearing of the application.

The defendants were both in default, and the plaintiff was allowed to take out execution. His application was made after the Code had come into operation, but the petition required by the 347th section of the Code did not contain the particulars required by the 224th section of the Code.

I cannot find that plaintiff took advantage of the concession to issue writ.

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1896.
January 24 and 31.
WITHERS, J.

On the 31st January, 1895, he applied to the Court again for leave to execute his decree, but in his petition he suppressed a very important particular, viz., (*f*) in section 224 of the Code, "whether any and what previous applications have been made "for execution of the decree, and with what result."

The appellant did not appear on notice. His co-debtor appeared in person. The application was allowed; but, looking at the strict provisions of the 337th section of the Code, that where one application to execute a decree has been made under the Code and granted, no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, or that execution was stayed by the decree holder at the request of the judgment-debtor, I feel confident that the Judge was unaware of the application for execution and the grant in 1891.

Writ was issued, and the Fiscal made return thereto on the 26th June, 1895, that his officer had repaired to the residence of the judgment-debtors and required them to pay the amount of the writ; that neither complied with this requirement; that neither pointed out property for seizure; and that his officer was unable to find any property of either debtor, movable or immovable. Upon this return the plaintiff moved on the 10th July, 1895, for a warrant for the arrest of the judgment-debtor, and he was brought up and committed to prison.

I think this order of committal cannot be sustained. In the first place the Fiscal's return upon which the commital is found was made in a writ of execution under an order which *improvide emanavit.*

The order of the 7th March, 1895, was evidently made in ignorance of the application of the 4th May, 1891, to execute the unratified decree, and the grant of that application on the 26th May, 1891.

That order being unsound, the writ and the return become unsound also.

In the next place, I think that the Fiscal's return to the writ of execution mentioned in the 298th section of the Civil Procedure Code must be his return to the writ of execution originally issued.

I would have our judgment in case of *De Silva v. Sella Umma* (*2 S. C. R. 155*) so read.

I would discharge the order of the 7th March, 1895, and the order committing the appellant to prison.

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31st January, 1896. LAWRIE, J.—

The learned District Judge on the 5th of November, 1895, stated that he was satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, and he therefore granted the application for execution to re-issue against the person of the judgment-debtors. Against this finding and order no appeal was taken. On 28th November the second defendant was brought before the Court under the warrant of arrest.

His proctor then objected that the debtors could not legally be committed because more than ten years had expired since the date of the decree.

The learned Judge repelled that objection, and directed the debtor to be committed. Against that order this appeal was taken.

In this case a previous application to execute the decree had been made and granted under chapter XXII. of the Code.

That fact distinguishes the present case from that reported in *1 S. C. R. 307*, and brings it within the scope of the judgment in 81,658, D. C., Kandy, referred to in the petition of appeal.

It seems to me that the 337th section is applicable, and that section enacts that no subsequent application shall be granted after the expiration of ten years from the date of the decree sought to be enforced unless the judgment-creditor has by fraud and force prevented the execution of the decree at some time within ten years immediately before the date of application. The date of decree in this case was 27th September, 1884.

The application for warrant against person was 10th July, 1895. More than ten years had elapsed.

I am unable to agree with the reasoning of the learned District Judge, by which he has satisfied himself that the 337th section does not apply to warrants of arrest against person. It seems to me opposed to the spirit of the enactment, and indeed to its plain words, and in that I am confirmed by the judgment of this Court (Bonser, C.J., and Browne, A.P.J.) in the Kandy case already referred to.

On this ground I am for setting aside the judgment under appeal.

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MOHAMADU LEBBE *v.* UMMA NATCHIA.

D. C., Kalutara, 1,134.

Res judicata—*Action by mortgagor against representative of deceased mortgagee—Civil Procedure Code, s. 642—Effect of mortgage decree on such representative—Personal claim of representative to land mortgaged by deceased.*

A mortgage decree in an action brought against the representative, appointed under section 642 of the Civil Procedure Code, of a deceased mortgagee, will estop such representative from questioning the right of the mortgagor to mortgage the lands decreed executable.

If the representative, who was the widow of the mortgagor, was entitled to the land in her own right, she should not have assumed the representative character imposed on her.

Per LAWRIE, J.—Under a decree passed in such an action no other land can be seized in execution than those named in the decree as a executable.

IN a previous case plaintiff having sued the defendant, as representative of the estate of her deceased husband, for the recovery of a sum of Rs. 353 and interest secured by a mortgage bond executed by her late husband, obtained a judgment declaring the mortgaged lands bound and executable for the said debt. On writ being issued, the Fiscal seized certain other lands in addition to the land that was mortgaged, and the defendant claimed these lands and one of the mortgaged lands as her own. The District Judge upheld her claim, and the plaintiff brought the present action against the defendant, under section 547 of the Civil Procedure Code, to have a declaration that the said lands were liable to be sold under the said writ.

The District Judge dismissed the plaintiff's action, and the plaintiff appealed.

Dornhorst, for appellant.

Peries, for respondent.

11th February, 1886. LAWRIE, J.—

Meera Lebbe Marikar mortgaged some lands to the plaintiff; after the mortgagor's death his widow was appointed to represent the estate of the deceased mortgagor for all the purposes of an action on the mortgage.

The widow appeared and contested the mortgagee's claim, but her objection or defence, whatever it was, was repelled, and a mortgage decree was pronounced.

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On writ on this decree some lands were seized, and the widow claimed these as her own by a title adverse to her late husband.

The Court sustained the claim and released the property from seizure.

The plaintiff then brought this action under section 547. One of the lands seized and claimed was a land mortgaged which had been declared bound and executable in the judgment against the defendant.

It seems to me clear that she is bound by that judgment, and that the plaintiff is entitled to have the land sold.

As to the other lands seized, which were not mortgaged, the defendant is entitled to claim that these be excluded from the seizure. She does not represent the whole estate of the deceased; assuming that these mortgaged lands belonged to the deceased, they can be touched only in a suit to which his general legal representative is a party. I need not enter on the question whether these unmortgaged lands belonged to the widow personally. It is enough that we decide that, under a decree passed in an action against a representative of the estate, appointed under section 642, no other land can be seized than those named in the decree as executable.

The judgment dismissing the action is set aside. The plaintiff is entitled to judgment declaring the mortgaged land executable, but his action, *quoad* the other lands, must be dismissed. I would give no costs, success being divided.

WITHERS, J.—

It seems to me that defendant cannot escape the consequences of taking up the appointment of administratrix of the deceased mortgagor's estate for the purpose of this hypothecary action, and not limiting her defence—if it were possible to do so—to the existence and subsistence of the debt for which the specially hypothecated properties were secured by her deceased husband.

She could easily have found out by inquiry the fact that her lands, as she claims them to be, had been secured by her husband without any right so to bind them, and she was not obliged to assume the representative character imposed on her.

I fail to see how she can now be heard to say that the lands specially mortgaged by her late husband are not executable under the mortgage decree to which she was a party.

I am therefore of opinion that the judgment should be modified in the manner proposed by my brother Lawrie.

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1895.
October 18.

BABASURIYA *v.* CHARLES *et al.*

D. C., Mátara, 792.

Conveyance of land—Validity of it, for want of description by metes and bounds—Evidence.

A conveyance is not invalid for want of description of land by metes and bounds. Its identification and limits are provable by parol evidence.

THE facts of this case appear in the judgment of the Chief Justice.

Sampayo, for appellant.

Bawa, for respondent.

18th October, 1895. BONSER, C.J.—

In this case the plaintiff seeks to recover possession from the first defendant of a piece of land. The first defendant stated that he was merely a lessee—he cited his lessor, who was accordingly brought in and made second defendant in order to assert his title to the land.

The first defendant set up a claim to retain the land until the plaintiff had paid him the value of certain improvements which he alleged he had made on the land. He would be entitled to this if the improvements were really made. Evidence was gone into, which, as usual, was conflicting. The District Judge has found that the first defendant made no improvements, and I do not see how we can disturb that finding.

The second defendant disputes the title of the plaintiff. He says the land originally belonged to him, and was seized and sold by the Fiscal some eight years ago on a writ of execution against him, and purchased by the plaintiff. He contends that inasmuch as the Fiscal's transfer did not give a description of the land by metes and bounds the conveyance was invalid, and passed nothing. Mr. Sampayo attempted to support that contention, and he boldly stated that it was law in this Colony that, unless a conveyance contained a full description of the property by metes and bounds, it was void. He admitted that in the case of wills it was different —a demise was good without such description. He could not point out to us any special enactment of the Legislature of this Colony which laid down any such law as this, nor could he refer us to any decision of this Court. He did refer to the Registration Ordinance, but that Ordinance has nothing to do with the validity of conveyances.

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It enacts that land specified in instruments which are registered are to be described in a particular manner. But non-registration does not make a deed void. This deed must be construed by the English Law of Evidence. The proposition asserted by Mr. Sampayo that oral evidence could never be used to identify property included in a conveyance is absolutely without foundation. It is difficult to conceive a case in which oral evidence will not be necessary even when the property has been fully described by metes and bounds. Such evidence cannot be admitted to contradict or vary a writing, but it is always admissible to explain a writing.

Mr. Taylor, in his book on Evidence, section 1,082, states: "It may be laid down as a board and distinct rule of law that "extrinsic evidence of every material fact which will enable the "Court to ascertain the nature and qualities of the subject-matter "of the instrument, or, in other words, to identify the persons and "things to which the instrument refers, must of necessity be "received." Again, he says: "If an estate be conveyed by the "designation of Blackacre, parol evidence must be admitted to "show what property is known by that name."

In the present case the conveyance was of a divided portion belonging to the judgment-debtor of a certain garden which is described. More than that, by reference to the plan which is attached to the deed it appears clearly what land was intended to be conveyed. The divided portion is denoted by the letter C, and is stated to be the property of the judgment-debtor.

The appeal will be dismissed.

WITHERS, J.—I quite agree.

The defendant's attack on plaintiff's title on the ground of misdescription is a very disingenuous one, in my opinion.

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1894.
July 4.

VELLAYAPPA CHETTY *v.* SINNETAMBY *et al.*

D. C., Kurunégala, 612/M 420.

Joint promissory note—Right to sue the personal legal representative of a deceased maker jointly with the surviving maker.

A personal legal representative of a deceased maker of a joint promissory note cannot be sued jointly with the surviving maker. The only exception to this rule is the case of a partnership, where recourse may be had against the estate of a deceased partner.

THE judgment of the Chief Justice recites fully the facts of this case.

Wendt, for second and third defendants appellant.

Dornhorst, for respondent.

4th July, 1894. BONSER, C.J.—

This is an action on a promissory note, which was made by four persons in favour of the plaintiff. Three of these persons are dead, and the survivor is now sued, and with him four persons who are alleged to represent the estates of the deceased makers.

The District Judge has given judgment for the plaintiff as against all the defendants, who are sued as representing the estates of two of the deceased makers; and the question arises whether they could properly be sued in this action. The promissory note is a joint one, and not a joint and several one, and there is no question of partnership between the makers. Therefore, the sole point for decision is, whether a personal legal representative of a deceased maker of a joint promissory note can be sued jointly with the surviving maker.

By the law of this Colony actions on promissory notes are governed by the law of England, and the law of England is perfectly clear. The law is stated clearly and concisely in Williams on Executors, 7th edition, vol. 2, p. 1740, as follows:—"In the case of a joint "contract, where several contracts on the same part, if one of the "parties die his executor or administrator is at law discharged from "all liability, and the survivor or survivors alone can be sued. "And if all the parties are dead, the executors of the survivor is "alone liable."

That being the law of England it must be applied to this action. The only exception to the rule is the case of a partnership, where recourse may be had against the estate of a deceased partner, but that exception does not apply to this case, and therefore this action was wrongly framed, and no relief can be had as against the appellants.

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The judgment of the District Court must be set aside with regard to the present appellants. 1894. July 4.

Under the circumstances of this case, the order will be that neither party shall get costs either in the District Court or in this Court. BONSER, C.J.

WITHERS, J.—I agree.

MOHAMMADU LEBBE *et al.* *v.* KOREEN *et al.* 1893. October 20 and 31.

D. C., Jaffna, 2,384.

District Court—Jurisdiction to interfere in religious disputes—Right of holder of religious office to relief when disturbed in enjoyment of property attached to such office.

A District Court has no jurisdiction to interfere in the concerns of religious communities unless, in the rules which any religious community has made for its members in relation to the religious object which it has combined to maintain, a civil element enters, which brings the matter within the sphere of the civil jurisdiction of the courts.

A holder of an office who has been duly appointed thereto by the religious community to which he belongs will be supported in the exercise of that office, if there is attached to it as an incident some estate in tenure of or right to the possession and enjoyment of movable or immovable property.

THIS was an appeal by the plaintiffs from a decree of dismissal. The facts of the case appear in the judgments of the Supreme Court.

Dornhorst appeared for plaintiff appellant.

Cur. adv. vult.

31st October, 1893. WITHERS, J.—

The plaintiffs claim to be joint officiating priests of a Mohammedan mosque known as Meydisen Pallivásal, and they allege that the defendants have interrupted them in the exercise of their office, and refuse to allow them to enter the mosque for the performance of the duties incumbent on them as such high priests, and to exercise the rights and enjoy the privileges of their office. After hearing some of the witnesses called for the plaintiff, the learned judge stopped the proceedings and dismissed the action on the ground that his Court had no jurisdiction to interfere in the concerns of religious communities.

The plaintiffs appealed from this judgment. There was no appearance for the respondents.

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1893. October 20. and 31.

WITHERS, J.

I think the proposition of law laid down by the learned District Judge requires some limitation.

In a recent case reported in *1 S. C. R. 354*, I had occasion to observe that a District Court has no jursidiction to interfere in the concerns of religious communities unless, in the rules which any religious community has made for its members in relation to the religious object which it has combined to maintain and support, a civil element enters, which brings the matter within the sphere of the civil jurisdiction of the courts.

After giving illustrations of what I meant by the term civil element, I went on to observe that the holder of an office, who has been duly appointed thereto by the religious community to which he belongs, or who succeeds in due course of such office according to rules binding on the community, has been and will always be supported in the exercise of that office, if there is attached to it as an incident some estate in tenure of, or right to, the possession and enjoyment of immovable or movable property.

As at present advised, I adhere to that opinion, and, so thinking, I have no alternative to propose but that of remitting the case for further inquiry.

Incident to the tenure of the offices alleged to be held by the plaintiffs, and the performance of duties required of the holders, is said to be the privilege of receiving and keeping fees paid (gratuitously no doubt) by those for whom services are duly performed—services connected with prayers, marriages, funerals, &c. Whether the plaintiffs or either of them will make out a case for redress, is another matter, but, having regard to precedent, I am of opinion that the plaintiffs should be allowed fully to put forward their case on such material as they may be advised to submit to the Court, and for this reason the judgment of the lower Court should be set aside.

BROWNE, A.J.—

On the 8th February, 1867, one Seku Meiyadin Muhammado Meiyadeen and the first defendant executed and granted what is termed a charitable donation deed of a certain land "in order "that all the Mussulmans who belong to and embrace the religion "of the Prophet Mohamet, called Purukare Vedam, may, with "the grace of our Master Muheyadeen Abdul Cader reasonably "and in accordance with the religious rules conduct and observe "for ever, without any objection, all the penance and other rites "belonging to and mentioned in the religious rules." The deed contained no other words than these to designate any trust or the manner of officers for its execution.

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In their plaint plaintiffs assert that a mosque was then built and dedicated by this deed "as a place of worship for the use of "the Muhammadan public, to be used and managed according to "the will of such of the said public as form the congregation of "the said mosque," and that at that time also one Sego Madar Lebbe was at a meeting of the said Muhammadan public appointed officiating priest of the said mosque, and held office until 1882.

Plaintiffs then assert in brief that at a meeting of the said Muhammadan public held in May, 1882, at the grand mosque, apparently some other mosque, the first plaintiff was appointed officiating priest and to receive the profits of the office, and that at another later meeting held in 1886, second plaintiff was appointed joint officiating priest, and that they officiated "in the prosecution "of the objects of the said dedication," and received the incomes and perquisites of their office until the 26th June, 1892, when the defendants forcibly turned them out of the mosque and prevented them from performing their ceremonies and keep them deprived of the profitable user of the said office; and that since such time second defendant has been wrongfully performing the ceremonies of the said priesthood, and both defendants have been receiving and enjoying the perquisites of the said office: and the plaintiffs pray for a declaration of their right to officiate and to receive the incomes, emoluments, and profits; their reinstatement; the inhibition of defendants from resisting plaintiffs and from officiating and taking the emoluments; and for damages and costs.

The defendants deny that the plaintiffs were ever appointed priests of the mosque, which first defendant says he built and dedicated as a place of worship, always remaining manager thereof, and that he (he does not say when) appointed second defendant priest thereof.

I agree with my brother that the District Judge should not have stopped hearing plaintiff's evidence, and that his statement that "a District Court has no jurisdiction to interfere in the con- "cerns of religious communities" is too general. Courts will not interefere in purely ecclesiastical matters, such as a complaint that a Muhammadan priest refused to perform funeral services [*R.* (*1867*) *240*], or a question where a festival should, consistently with religion be celebrated (*Morg. 51*), or in a mere matter of church discipline (*2, B. & V.*, *67*). But our own courts have, ere now, entertained and decided questions affecting such rights as to appoint a dean (*3 Lor. 238*) or priests [*L. M. sp. 17* (*Muhammadan*) and 13; and 1866. 60 (Christian)] or to celebrate a festival

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1893. *October 20 and 31.*

BROWNE, A.J.

(*Morg. 51*) or rights to property, such as fabrics and ground and revenues which were not voluntary as offertories and fish rents (*vide* the last two cases cited).

No doubt, so far as the case has as yet proceeded, the evidence of what emoluments the plaintiffs have received has tended to show them to be of such a character that plaintiffs could not show any right to them, viz., such a right as they could enforce against the contributories thereof to insist upon their payment. But even if the right to officiate was not functuous of any actual pecuniary or other benefit to the priest, it may be a right in and for the exercise of which he may claim the protection of the courts, and these plaintiffs appear *primâ facie* to be entitled to call upon the courts to decide whether they are entitled to have the prayers of their plaint or any of them granted to them. I agree that the case must be remitted for further trial, and in the possibility thereof I may draw attention to the fact that some of the questions which seem possible on the pleadings in this case, viz., as to who form the congregation of the mosque (assuming plaintiffs substantiate by proof all the averments of the first paragraph of their plaint), and what meeting thereof could validly elect a priest formed the subject of much discussion in the action 61,162. D. C. Colombo, dealing with the trust created by the award of Mr. Lorensz made in 5,214, testamentary, of that Court, respecting the administration of the Cinnamon Gardens mosque, which followed upon the litigation of the action 53,373 of that Court.

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RAMALINGAM *v.* RAGUNATHA KURUKKAL. SAMBANTAR, Claimant.

1895. *October 10.*

D. C., Jaffna, 24,021.

Appeal—Costs in claim inquiry—s. 241 of the Civil Procedure Code—Revision.

When in an investigation, under section 241 of the Civil Procedure Code, into a claim in execution the Court awards costs to the successful party, the order as to costs is not an appealable one.

Semble, per Curiam.—Where, in the case of a claim to land seized in execution, the execution-creditor had not pointed out the land for seizure, or taken any steps in the matter, before the seizure or after it, which might be held to be a ratification of the act of the Fiscal, and had taken no part in the proceedings at the inquiry, he ought not, if the claim is upheld, to be condemned in the claimant's costs.

THE facts of the case sufficiently appear in the judgment of BONSER, C.J.

Bawa, for plaintiff, appellant.

10th October, 1895. BONSER, C.J.—

In this case the appellant was a judgment-creditor. He got an execution against his debtor. The debtor, when the Fiscal went to execute the writ, pointed out property as his, which belonged to a third person who claimed the property, and the Fiscal reported the matter to the Court. The Court held a summary inquiry into the claim under section 241 after citing the judgment-creditor, the Fiscal, the judgment-debtor, and claimant to attend. The judgment-creditor attended, but, so far as we can see from the record, took no part whatever in the proceedings. He does not appear to have called any witnesses. The District Judge allowed the claim, but held that the judgment-creditor should pay the costs of the investigation. Against that order the judgment-creditor has appealed. It has been held that an order made under section 244 is not an appealable order, but that the remedy is under section 247, and if the order, either admitting or disallowing the claim, is not an appealable order, I fail to see how any part of that order is appealable, as, for instance, the part dealing with the costs. Therefore, in my opinion, the appeal does not lie. If it be the fact that the appellant neither pointed out the land, nor took any steps in the matter, before the seizure or after the seizure, which might be held to be a ratification of the acts of the Fiscal, and if on the inquiry he took no part in the

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1895.
October 10.

BONSER, C.J.

proceedings, I am of opinion that he ought not to be made to pay the costs. Therefore, the proper course will be to exercise our powers of revision, and to send the record back to the District Judge in order that he may make any remarks regarding it that he may think proper to make, and that notice be given to all the parties who were present at that inquiry, including the Fiscal and execution-debtor, that we propose to take the matter up in revision.

WITHERS, J.—I agree.

Assuming that the Court is competent to make order as to costs in these claim inquiries, that must be included in the formal order drawn up by the Court at the conclusion of the inquiry ; for an order, like a decree, should state by what parties, and in what proportion, costs are to be paid.

That being so, as it has been held that no appeal can be taken from an order under this chapter, it is plain that no appeal can be taken from that part of it which awards costs.

As it appears from the presentation of the case to us, that the execution-creditor should not be made liable to pay costs of the claim, the order should be brought up in revision after notice to the Judge and the other parties concerned.

1895.
November 7.

PALANIAPPA CHETTY *v.* GOMES *et al.*

D. C., Colombo, 3,430.

Civil Procedure Code, ss. 337–349, 219, 298—Second application for writ —Due diligence.

When a judgment-creditor issues writ against the property of the judgment-debtor, and the Fiscal reports that the judgment-debtor is not possessed of any property, it is the duty of the judgment-creditor to apply under section 219 of the Civil Procedure Code to have the debtor examined as to what property he is possessed of and what debts are due to him, or to have the debtor's person arrested under section 298 of the Code. If a judgment-creditor does not avail himself of either of these provisions, he cannot be said to have used due diligence to secure complete satisfaction of the decree, as contemplated by section 337 of the Code, and is not entitled to make a second application for execution of the decree.

THE facts of the case are sufficiently stated in the judgment of WITHERS, J.

Sampayo, for appellant.

Jayewardene, for respondent.

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7th November, 1895. WITHERS, J.—

1895. November 7. WITHERS, J.

This appeal is against an order of the Acting District Judge, Mr. Templer, refusing to allow the plaintiff, as execution-creditor, to execute a decree under section 337 of the Civil Procedure Code. He obtained a decree on the 14th December, 1892, and applied for a writ on the 19th of the same month. Writ against property was issued on the 12th February following. This matter came up before the Chief Justice and myself a short time ago, and we called for the Fiscal's return to that writ. When the return was exhibited, we found it to be no return at all, and the record was sent back to the District Court that the Fiscal might be directed to make a return conforming to the requirements of the Code. This amended return is before us now, and from it it appears that the Fiscal duly applied to the execution-debtor, in person, for the payment of the debt, and that the debtor failed to comply with the demand, and further failed to surrender any property when requested. It was open to the plaintiff-creditor in this case to have adopted two steps: one, which might have disclosed the seizable debts of his judgment-debtor; and another, which probably would have compelled the payment of his debt. I refer to section 219 of the Civil Procedure Code as regards the first step, and to taking out warrants against the person of the debtor under the provisions of section 298 of the Code as regards the other.

Having failed to take either steps, the creditor was *primâ facie* wanting in due diligence. But he attempts to excuse himself by saying that soon after the writ issued he came to some arrangement with the judgment-debtor by which the debt was to be paid off by instalments, and he declared that he has, from time to time, received money on account from his judgment-debtor, and it is for the balance of this unsatisfied judgment that he made application for a second issue of process. The judgment-debtor strenuously denies that he ever made any arrangements of the kind, or any of the payments on account of this claim. In his answering affidavit he says that judgment was recovered against him without any knowledge of these proceedings on his part, and he alleges that the note on which judgment was recovered was negotiated in breach of trust by the payee, one Arunasalam.

With these conflicting affidavits before him, the Acting District Judge advised himself to treat the matters as if these were no affidavits at all, and I think he was justified in taking that course. It is clear that the appellant did not exercise due diligence in attempting to recover his judgment debt. Assuming, however, that this agreement was entered into and that these payments were made, his conduct in this matter is open to these objections.

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1895.
November 7.
WITHERS, J.

In the first place, he ought to have moved to recall the writ, and further he ought, under the provision of section 349, to have certified the payments to the Court from time to time. His having done neither the one nor the other leads me very strongly to suspect that the arrangement and these alleged payments are fictitious, prepared to procure his present application being granted, in view of the time that has elapsed between decree and his application to re-issue writ.

Affirmed with costs.

BROWNE, J., concurred.

1895.
June 14.

MUTTIAH CHETTY *v.* DE SILVA *et al.*

D. C., Galle, 2,721.

Contract by minor—His liability on promissory note—Interest, how to be decreed—Civil Procedure Code, s. 129—Evidence of certificate of birth—Ordinance No. 18 of 1867, s. 27.

Under the Roman-Dutch Law the *filius familias* could not bind himself without the consent of his father, except with regard to certain kinds of property. If he contracted, his contracts would not bind him, although, if they were beneficial to the minor, the other party would be bound (*Cens. For. lib. 1, chapter IX., section 5*).

A contract entered into with the authority of his father would bind the unemancipated minor, subject, however, to his right in certain cases, if the contract was a detrimental one, to apply to the Court for the remedy of *restitutio in integrum.*

This remedy, however, is not available in cases where a minor practising a trade or profession incurred liabilities in the course thereof.

Semble, per BONSER, C.J.—Trading is not of itself sufficient to emancipate a *filius familias* so long as he lived under the father's roof. Where a minor and his father, trading together, had granted a joint and several note stipulating for interest at the rate of 15 per cent.—

Held (1), that the plea of minority is not open to the minor, as the note must be presumed to have been made with the consent of the father; and (2) that the proper method of ordering interest in the decree is that interest should be calculated down to the date of the commencement of the action, and from thence to the date of the decree at the rate of 15 per cent., and a decree given for the aggregate amount made up of the principal and these two sums for interest, and from the date of the decree the interest should be given on the aggregate amount at the rate of 9 per cent.

Semble, per BONSER, C.J.—A certificate of birth given under Ordinance No. 18 of 1867 is *primâ facie* evidence, not only of the birth, but also of the date of birth.

Letchiman Chetty v. Perera (4 S. C. C. 80) queried.

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1895. *June 14.*

THE facts of this case are sufficiently stated in the judgment of the Chief Justice.

Sampayo, for appellant.

Dornhorst, for respondent.

14th June, 1895. BONSER, C.J.—

This is an appeal from a judgment of Mr. Moysey, acting District Judge of Galle. The appellant was sued on a promissory note which he had made jointly and severally with his father who died after action brought, and the third defendant. He pleaded that at the time the note was made he was a minor, that is, was under the age of twenty-one years, which, by Ordinance 7 of 1865, has been fixed as the age of majority in this Island. It appears that he had been assisting his father in his business of boutique-keeper from the age of fourteen or fifteen onwards ; that the business was carried on under a firm name composed of his own and his father's names ; that he lived in his father's house and was unmarried ; and that the note was given for the purposes of the business.

In support of the plea of minority he gave evidence that he was a minor at the date of the making of the note, and produced a certificate of his birth given under Ordinance No. 18 of 1867. This certificate is not attached to the record, and we do not know what it contained, but I assume that it contained the particulars required by law, amongst which is the date of birth, and was otherwise in order. The Acting District Judge refused to admit this certificate in evidence on the ground that there was no independent evidence of the date of birth, and that therefore the certificate could not be received to prove that date, relying on *Letchiman Chetty v. Perera* (*4 S. C. C. 80*).

In that case CLARENCE, J., is reported to have said :—" The 27th " clause of the Ordinance (Ordinance No. 18 of 1867) makes the " certificate evidence of the birth, but does not say that it is to be " evidence of the date of birth. This purports to be a birth which " happened several years before the passing of the Ordinance, " namely, in 1858, and the registration purports to have taken " place in 1869, upon the father's information. The Ordinance " has made the Registrar-General's certificate evidence of the " fact of birth, but I do not see that the Legislature has made it " evidence that the birth took place on the 3rd of September, " 1858. At any rate, in this case I am not disposed to accept " it as conclusive evidence that the birth happened on that " date."

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1895.
June 14.
——
Bonser, C.J.

Dias, J., concurred, without giving a separate judgment.

I must confess that I do not understand what would be the object of making the certificate evidence of the *fact of birth*. That fact, I should have thought, was sufficiently evidenced by the existence of the person. It will be noted that the learned Judge declines to accept the certificate as *conclusive* evidence, while the Ordinance does not purport to do more than to make it *primâ facie* evidence, and that he appears to rest his decision on the special facts of the case. If that case is to be understood as laying down the rule that a certificate of birth cannot in any case be regarded as *primâ facie* evidence of the date of birth, I wish to state that I am not at present prepared to agree with it, and reserve my right to deal with it when the question arises for decision.

But in the present case it is not necessary to determine the point, for, assuming that the appellant was under age when he made the note, I am of opinion that the plea of minority is no defence to this action. By the Roman law, a minor under the age of twenty-five years of age, but above the age of puberty, appears to have full legal capacity of entering into any kind of contract, subject to its being rescinded by the Prætor, if it was unfair to the minor.

The Dutch law, however, curtailed this freedom to a considerable extent.

The *filiusfamilias* could not bind himself without the consent of his father, except with regard to certain kinds of property. If he contracted, his contracts were not binding on him, though, if they were beneficial to the minor, the other party was bound. Van Leeuwen says :—*Præterea consistit* (*patria potestas*) *in auctoritate præstanda, sic ut filiusfamilias sine consensu patris ne quicquam polliceri, aut se contrahendo obligare, aut in judicio cum quoquam experiri possit, nisi in castrensi peculio vel quasi, in quibus pro patribusfamilias habentur.* (*Cens. For. lib. 1, chapter IX., section 5.*)

But a contract entered into with the authority of his father bound the unemancipated minor, subject, however, to his right in certain cases, if the contract was a detrimental one, to apply to the Court for the remedy of *restitutio in integrum*, *i.e.*, rescission.

This remedy, however, was not given in cases where the minor practising a trade or profession incurred liabilities in the course thereof, for the *imperitia negotiorum*, which was the foundation of this relief, was considered to be wanting in such cases (See Van Leeuwen, *Cens. For. lib. 4, chapter XLIII., sections 4 and 5 ; Voet, 4, 4, 51*).

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In the present case the promissory note was undoubtedly made with the consent of the appellant's father, for he was a joint maker, and I am therefore of opinion that it was binding on the appellant. It was suggested that the appellant had become emancipated by reason of his being engaged in trade with the assent of his father; but I doubt whether, in the circumstances of this case, he was emancipated; for I gather that, according to Roman-Dutch law, trading was not by itself sufficient for this purpose so long as the *filius familias* lived under his father's roof (see *Grotius, Intro. 1, 6, 4; Cens. For. lib. 1, chapter IX., sections 11 and 15; Voet, 1, 7, 12*).

The decree, however, should be varied. The promissory note was for Rs. 3,000, with interest at 15 per cent. The decree orders the appellant and the other defendant to pay the plaintiff the sum of Rs. 3,000, " with interest thereon at the rate of 15 per cent. per " annum from the 19th of August, 1893 (the date of the note), until " payment in full." The interest ought to have been calculated down to the date of the commencement of the action, and from thence to the date of the decree at the rate of 15 per cent., and a decree given for the aggregate amount made up of the principal and these two sums for interest. From the date of the decree the interest should have been given on that aggregate amount, and not on the original principal sum of Rs. 3,000, and that not at the rate of 15 per cent., but of 9 per cent., which is the Court rate of interest. The words " such rate " in section 192 of the Civil Procedure Code may I think be fairly taken to mean " such last-mentioned rate." The original debt is merged in the decree and no longer exists, and no rate was agreed upon by the promissory note as to interest on the decree.

The decree should, therefore, be amended by substituting for the sum of Rs. 3,000 the sum which represents the aggregate amount above referred to, and substituting for the words " at the rate of " 15 per cent. per annum from 19th of August, 1893, until payment " in full " the words " on such aggregate sum of Rs. 3,459 at the " rate of 9 per cent. per annum from the 27th August, 1894, until " payment."

I wish to say, in conclusion, that I have assumed that the appellant had attained his majority at the date of action brought. If he should be able to establish the contrary, this judgment will not preclude him from making an application under section 480 of the Civil Procedure Code to have the proceedings set aside.

Browne, A.J.—

As in the view I take of the case it is not necessary to determine the effect of any certificate of registration of birth, and as the

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1895. *June 14.* — BROWNE, A.J.

certificate tendered in this case is not in the record, I agree that this question, considered with different results of opinions thereon in *4 S. C. C. 80* and *3 S. C. R. 82*, should await further decision hereafter when necessary.

Assuming on behalf of the appellant that he adduced sufficient *primâ facie* proof to establish in his favour the first issue, that he was a minor when he made and granted the promissory note sued upon, I hold on the second issue that he is liable upon it on his own showing for the reasons stated in *Voet 4, 4, 51.* I regard the principles there stated as altogether independent of the considerations of *seorsim a patre* and *sejuncta filii a patre habitatione*, which attach to all acts mentioned in *lib. 1, 7, 12*, as indicative of emancipation from the *patria potestas*, and hold that the public profession of business, skill, and knowledge entails the liability for all transactions therein, whether the minor's father had knowledge, and gave consent thereto or not. I agree also that the decree should be amended as regards computation of interest in the manner suggested by my Lord.

1896. *April 1 and May 8.*

PERIS *et al.* *v.* PERERA *et al.*

D. C., Colombo, 4,981/C.

Partition—Ordinance No. 10 of 1863, ss. 4, 6, 9—Interlocutory judgment in action for partition—Final decree, effect of—Duty of Court in partition suits—Proof of title of co-owners—Adding parties——Proceeding where all co-owners cannot be ascertained.

The effect of section 9 of Ordinance No. 10 of 1863 is to give persons taking title under the decree in an action for partition under that Ordinance a title good against the true owner, but the decree referred to in that section is not the interlocutory decree of partition under section 4, but the final judgment under section 6 awarding shares in severalty, and entered after receipt of the return of the commission for partition.

The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.

After the Court is satisfied that the plaintiff has made out his title to the share claimed by him, it should direct inquiries to be made whether all the parties interested in the land are parties to the action, or have been served with notice, and, on being satisfied on these points, order a partition or sale.

If all the parties cannot be found, the Court may allot severally the shares of the persons who have proved their rights to them, and

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may sell the remainder of the land, retaining the balance of the purchase money, after payment thereout of a proportionate share of the costs of the action, until the owners come forward and prove their title to it.

1896.
April 1 and May 8.

Dictum of PHEAR, C.J., in *Assena Marikar v. Usubu Lebbe, 1 S. C. C. 19*, disapproved.

Per BONSER, C.J.—(1) The District Judge should take care that the inquiry in a partition suit is not a perfunctory one. It is only after he is reasonably satisfied that all the owners who can be found are parties to the action, using, if necessary for the purpose, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties are entitled to certain shares, and directing a partition or sale, as the case may be.

(2) An interlocutory decree for partition under section 4 of the Ordinance, unless proceeded with, is useless for any purpose. It could not even support a plea of *res judicata*. Where such an interlocutory decree has been made, and not proceeded with, section 402 of the Civil Procedure Code should be applied by the Court, and its rolls cleared of the action.

Per WITHERS, J.—Claimants of shares who may have had notice of the proceedings only when the commissioner had taken steps to prepare his return should be let in, and their claims inquired into even if it should happen that they purport to modify the interlocutory judgment as to the shares of the actual parties to the record. After hearing the new claimants and the former parties, the Court may reform its interlocutory judgment.

PLAINTIFFS claimed an undivided three-fourths share of certain lands by right of inheritance from one Naide. They averred in their plaint that the defendants were entitled to the remaining fourth, and prayed for a partition of the lands between them and the defendants. The lands originally belonged to one Adohami and his wife Bancho. Adohami died leaving five children, two sons and three daughters; and the plaintiffs averred that the two sons possessed the lands to the exclusion of the daughters. Naide was one of those two sons. Bancho gifted her half to Naide, and he and his brother Simitchi thus became entitled to the entirety of the lands in the proportion of three-fourths and one-fourth. Naide died leaving eight children, six daughters and two sons—to wit, the two plaintiffs; and the plaintiffs alleged that they possessed the three-fourths share to which Naide was entitled to the exclusion of their sisters. The defendants, they averred, were, as the descendants of Simitchi, entitled to the remaining fourth. Certain added parties to the suit claimed a divided portion of the lands. The District Judge, after trial, rejected their claims, and decreed a partition as prayed for in the plaint.

The added parties appealed.

Dornhorst and *Jayewardene*, for appellants.

Wendt, for plaintiffs, respondents.

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1896. April 1 and May 8.

The case was first heard before BONSER, C.J., and LAWRIE, J., but was set down for re-hearing before the Full Court.

Cur. adv. vult.

Their Lordships were of opinion that the descendants of the plaintiffs' paternal aunts, to wit, the three sisters of Naide, and the plaintiffs' own six sisters, should have had notice of this action; and in remitting the case for further inquiries as to the persons interested in the lands and their respective shares, delivered the following judgments.

8th May, 1896. BONSER, C.J.—

I agree in the judgment which will be read by my brother Lawrie, but I desire to add a few observations on these actions *communi dividundo* for the assistance as well of the District Court to which this case is remitted, as of other inferior courts who may have to dispose of similar actions. The common law of this Island following the civil law, but therein differing from the English common law, held that *nemo in communione compellitur invitus detineri*. Hence the actions *familiæ erciscundæ* and *communi dividundo*, the former having application to the case of co-heirs and the latter to the case of co-owners who had become so otherwise than by inheritance.

In 1844 Ordinance No. 21 of that year was passed, which, after reciting that "the undivided possession of landed property is "productive of very injurious consequences to the inhabitants of "the Colony," proceeded to enact (*inter alia*) and declare that "when any landed property shall belong in common to two or "more owners, it is and shall be competent to any one or more of "such owners to compel a partition of the said property, and for "that purpose to present an application to any District Court "having jurisdiction praying for a partition;" thereupon the Court was to have power to issue a commission (section 10). The commissioners were required to make a partition, and for that purpose to prepare a schedule "showing the name, situation, "extent, and estimated value of the said property; the names of "the owners; the nature and extent of their respective shares or "interests; and the mode in which the commissioners propose that "such partition should be made." A copy of this return was to be given to each owner, and the original was to be returned to the Court with a survey (section 11).

Within three months after the return of the commission a day was to be fixed on the motion of any party for deciding on the application for partition; and if on that day the owners or their

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representatives appeared, and no valid objection was made to the return; and if any of them were absent and the Court was satisfied that notice of the application had been given them, or if they could not be found, then to the persons in actual possession of the property, the Court might decree a partition, and that decree was to be good and conclusive against all persons whatsoever (section 12).

Provision was also made for a sale in cases where a partition would be injurious or impossible (section 15).

By Ordinance No. 11 of 1852, which recited that the provisions relating to the partition and sale of lands held in common had been found to be attended with inconvenience, and to be in some respects injurious to parties interested in such property, those provisions were repealed, and co-owners were remitted to their rights of partition under the common law.

This state of things lasted until the passing of Ordinance No. 10 of 1863, which now governs these actions. That Ordinance, after declaring the common law right of co-owners to compel a partition or sale of the joint property, laid down a new procedure. The person desiring a partition or sale is to file a libel describing the property and specifying the names, residences, and interests of the co-owners, and the improvements made by them so far as known to him, and praying a partition or sale, as the case may be. A summons is then to issue to the parties named by the plaintiff, calling on them to appear and show cause why a partition or sale of the property should not be decreed; and such summons is to be served on the defendants, or if any of them cannot be found, then on the person in possession; or if there is no person in possession, then in such manner as the Court may direct. If the defendants make default, then the Court is to hear evidence in support of the plaintiff's title, and the extent of his share and of the title of the defendants, and the extent of their respective shares so far as may be practicable by any *ex parte* proceeding, and if the plaintiff's title is proved, to give judgment by default decreeing partition or sale.

If the defendants appear and dispute the plaintiff's title, or claim larger shares than the plaintiff gives them, the Court is to examine the title of all the parties interested, and to decree a partition or sale.

When the interlocutory decree for partition has been made, the Court may, on the application of any party to the suit, issue a commission to a commissioner or commissioners to make partition of the land, adjudging to each owner his proper share. The commissioners are in the presence of the parties to make the partition according to the ascertained proportions of the several

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1896. *April 1 and May 8.*

BONSER, C.J.

owners, and make a return accompanied by a survey, as was provided in Ordinance No. 21 of 1844.

The commissioners however are, thirty days before they make their partition, to fix in some part of the land a written notice of the day on which they purpose to make the partition, and also to give further notice by beat of tom-tom or otherwise in manner best calculated for giving the greatest publicity thereto.

This provision seems intended to give notice to all persons who may be interested in the land, and who may not be parties to the proceedings of what is being done, so that they may intervene in the suit if so advised. After the return of the commission the Court is to fix a day for considering the return, when the return will either be sent back for amendment, or may be confirmed with or without modification, in which latter case final judgment for partition will be entered.

This Ordinance, like the former Ordinance, enacts (see section 9) that the decree for partition or sale is to be good and conclusive against all persons whomsoever, whatsoever their rights may be, and whether they are parties to the proceedings or not, but it gives persons injured a remedy against the party by whose acts they have been damaged.

It has been held by this Court (*Don Carolis v. Watta Baba, 7 S. C. C. 125*) that the effect of this section is to give the persons who take title under the decree a title good against the true owner. It is not necessary now to decide whether this decision is right or not; but having regard to the whole scope of the Ordinance and to the provisions as to the publicity, I incline to think that it is. It is in the highest degree desirable that a title given by the Court should not be impeachable, and that purchasers and mortgagees should be able to deal safely with the persons declared by the Court to be the owners. At the same time I venture to doubt whether the decree of partition referred to in section 9 is the interlocutory decree of partition, as seems to have been the opinion of PHEAR, C.J. (see *Assena Marikar v. Usubu Lebbe, 1 S. C. C. 19*). This was merely a *dictum*, for it was not necessary for the decision of the case. Section 9 appears to me to refer to the final judgment in each case. In the case of a partition it is to be a judgment by which shares are awarded in severalty. Now, the interlocutory judgment for partition does not award any shares in severalty. It merely declares that the parties are entitled to certain undivided shares, and directs the commissioners to partition the land. It is the final judgment which awards the shares in severalty. These provisions appear to be borrowed from the English Act, 8 and 9, William III., chap. 31, which was the last

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English Act dealing with partition at the dates of the passing of the Ceylon Ordinances.

That Act provided that the final judgment was to include all persons, though not named in the proceedings; but a year was allowed within which a claimant could come in and apply to have the judgment set aside. That Act was repealed in 1867, and proceedings in partition in all English Courts are now governed by the Partition Acts of 1868 and 1876. It is to be regretted that the Legislature of this Island has not thought fit to legislate on this matter since the passing of these Acts.

It is to be observed that no conveyances are required, as in the case of partition made by the English Court of Equity. The party gets his title from the decree of the Court awarding him a definite piece of land. So Justinian lays down: *Quod autem istis judiciis* (*i.e.*, *Judiciis Communi Dividundo*) *alicui adjudicatum sit, id statim ejus fit, cui adjudicatum est.* (Institutes, 4, 17, 7.)

Whether or not the judgment be binding on the true owner who is not a party to the suit, it is obvious that the Court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The Court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties.

The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for, unless he makes out his title, his action cannot be maintained; and he must prove his title strictly, as has been frequently pointed out by this Court.

When he has done this, he has proved his right to maintain the action. The next step, according to the practice of the English Equity Courts, would be to make a decree directing inquiries to be made, whether all the parties interested in the land were parties to the action, or had been served with notice of the decree, and in that case ordering a partition or sale. I think that practice should be followed as nearly as may be. Section 508 of the Civil Procedure Code makes provision for inquiries of this kind.

Collusion between plaintiffs and defendants is always possible in these cases, and therefore the District Judge should take care that the inquiry is not a perfunctory one. It is only after he is reasonably satisfied that all the owners who can be found are parties to the action, using, if necessary, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties are entitled to certain aliquot shares, and directing a partition or sale, as the case may be. It would be desirable that where practicable the decree should be

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1896.
April 1 and May 8.
——
BONSER, C.J.

prefaced with such a declaration as follows :—" It appearing that " all persons entitled to or interested in undivided shares in the " land in the plaint described are parties to the action."

If all the parties cannot be found, I think that the Court may allot severally the shares of the persons who have proved their rights to them, and may sell the remainder of the land, retaining the balance of the purchase money after payment thereout of a proportionate share of the costs of the action until the owners come forward and prove their title to it.

In considering whether it should make a final decree for sale, or merely an interlocutory judgment for partition, the Court must take into consideration the circumstances referred to in the proviso to section 4 of the Ordinance. It is obvious that in the majority of cases a sale will be more beneficial to all parties. I would add, in conclusion, that an action under the Partition Ordinance cannot be made—as I suspect is not infrequently attempted—a substitute for an action *rei vindicatio*. An interlocutory decree for partition, unless proceeded with, is useless for all purposes. It would not even support a plea of *res judicata*. Where such an interlocutory decree has been made, but not proceeded with, provisions of section 402 of the Civil Procedure Code should be applied by the Court and its rolls cleared of the action.

WITHERS, J.—

I also agree with the judgment of my brother LAWRIE. I have had the further advantage of reading the CHIEF JUSTICE's judgment, and my Lord's observations on the procedure of partition actions have my hearty concurrence.

The importance of the subject induces me to add a few observations of my own. A plaintiff who has an interest in the soil and trees of a land in common with others, and desires to procure a partition or sale of the premises, may not know who all the co-owners and mortgagees of a land are. It goes without saying that he should do his best to ascertain who they are before he comes to Court. If the shares of the co-owners of soil and trees named in his libel do not *ex facie* exhaust the land, the Court, before making any order of partition or sale, should in my opinion by notice and advertisement, or in such manner as the Court thinks best for the purpose, endeavour to procure the attendance of all who claim to have common interests in the land.

This course should be followed where, after inquiring into the claims of the plaintiff and the defendants named in the libel, the parties are not found to own the entire land between them.

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If it so happens that all the co-owners of a land cannot be ascertained, and that land is one proper to be partitioned, then in my opinion the Court is entitled to divide amongst the claimants according to their shares so much of the land as those shares amount to, and to order the sale of the unassignable parcel, the net proceeds thereof being reserved for possible claimants on the fund. If the entire land ought to be sold, then the net balance of the sum equivalent to the unascertained shares will be reserved in the same way.

So much for cases in which all the co-owners of a land cannot be discovered before the judgment on the return to the comission for partition or sale, which is the final and conclusive judgment in these actions.

Considering that the final judgment binds others than the immediate parties to the partition suit, claimants to shares who may have had notice of the proceedings only when the commissioner has taken steps to prepare his return should be let in and their claims inquired into, even if it should happen that they purport to modify the interlocutory judgment as to the shares of the parties to the actual award. After hearing the new claimants and the former parties it may be that the Court will have to re-form its interlocutory judgment. This course seems to me to be in harmony with the provisions of the 18th section of the Civil Procedure Code. It is the paramount object of the Court in these cases to ascertain who are all the co-owners of the particular land sought to be partitioned or sold.

Again, it can hardly be too often repeated that unless a plaintiff strictly proves his title to a share in common with others, his action should be dismissed; that no share should be assigned to a claimant without strict proof of title; and that the interlocutory judgment as to the shares of the parties then before the Court does not determine the statutory action of partition.

LAWRIE, J.—

In this partition suit the learned District Judge decided that certain added parties had no share in the family lands. I am not satisfied that the decision is right, but counsel for the respondents was not fully heard because we found that all the necessary parties are not before the Court.

The plaintiffs seek a partition on the footing of a custom of inheritance in their family, unusual in the maritime provinces

Google

1896.
April 1 and May 8.
LAWRIE, J.

and opposed to the common law and to the Ordinance of 1876, viz., a custom that the daughters do not share with their brothers in the succession.

It is on this footing that the plaint is framed. The plaintiffs omit not only the descendants of their paternal aunts, but also their own six sisters. It is in vain to adjudicate piecemeal on the rights of parties in a partition suit. It would be embarrassing if we were now to decide on the evidence before us, whether the added parties have shares, because, if others are to be cited as defendants they would not be bound by a judgment at this stage to which they were not parties, and the question might require to be tried anew. Therefore it is necessary to set aside the partition decree and to send the case back for further inquiries as to the persons interested and their shares. Plaintiffs must give to the District Court the names of all the known living descendants of the paternal aunts and of the six sisters, and the descendants of such of them as have died.

By the law of the country these persons had by inheritance a right to share. It may be they have not possessed the lands in question, either because of other family arrangements or because the custom of exclusion of the females has been recognized and acquiesced in by them. Anyhow, it cannot be presumed that this abnormal custom exists in the absence of those whom the plaintiffs desire to exclude.

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SUPERMANIAN *v.* PERUMAL.

1894.
August 30.

D. C., Colombo, C/3,753.

Civil Procedure Code, ss. 300, 303, 305, 307 to 312—Release of judgment-debtor on terms—Alteration of terms of decree—Payment by instalments—Policy of the law as to incarceration of debtors.

Under section 300 of the Civil Procedure Code, when a judgment-debtor is brought before the Court after being arrested in execution of a decree for money, the Court, in certain circumstances, may, upon such terms, if any, as it thinks fit, make an order directing his release—

Held, that under this section the Court has no power to alter, to the creditor's disadvantage, the terms of the decree, and it cannot therefore allow the debtor the privilege of paying the amount of the decree by instalments. The terms intended by the section must be terms onerous to the debtor and not to the creditor.

Per Lawrie, J.—The policy of the law now is to discourage the incarceration of honest debtors who, from misfortune and poverty, cannot pay their debts, and to confine the creditor's remedy of imprisoning his debtor only, or at least mainly, to cases where the debtor is contumacious, and will not pay or disclose for seizure funds over which he has control.

THE facts of the case appear sufficiently in the judgments delivered by their Lordships.

Wendt, for appellant.

Dornhorst and *Sampayo,* for respondent.

30th August, 1894. Lawrie, A.C.J.—

In this appeal we are called on to decide what are the powers of a District Judge when a judgment-debtor is brought before him arrested on a writ against person.

It must be admitted that it is difficult to reconcile the 300th and the 305th sections of the Code, which both deal with this matter.

In the former (which is taken from the Indian Code) a discretion is given to the Court to release the debtor, either without conditions or upon terms, provided it appears to the Court that the debtor is unable to pay from poverty or other sufficient cause; and in determining whether he shall exercise the discretion, the Judge may take into consideration the five matters stated in section 303, and a judgment-debtor, released under section 300 and 302, may be re-arrested.

Then, it is somewhat puzzling to find in section 305 that a debtor shall be released if he satisfies the Court that he has no seizable property, or that he is ready and willing to point out all such seizable property as he possesses. It may, I think, be gathered

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1894. *August 30.* — LAWRIE, A.C.J.

from the sections, and from the sections 307-312, that the policy of the law now is to discourage the incarceration of honest debtors who, from misfortune and poverty, cannot pay their debts, and to confine the creditor's remedy of imprisoning his debtor only, or at least mainly, to cases where the debtor is contumacious, and will not pay or disclose for seizure funds which he has control over. Whatever be the District Judge's power, and whatever be the right given to the debtor by the 305th section, it is in my opinion certain that the Court has no power given to it to alter the decree under which the arrest has been made.

It cannot from pity reduce the debt from Rs. 100,000 to Rs. 10,000, nor can it (as the District Judge did here) transform the decree from Rs. 2,000 into one for a monthly payment of Rs. 50.

The 300th section speaks of releasing upon terms, but that means putting the debtor on terms; it does not mean imposing terms unfavourable to the creditor and favourable to the debtor. In other words, a Judge may not in the order of release alter to the creditor's disadvantage the terms of the decree.

In the present case, the debtor did not bring himself within the terms of the 305th section. The learned Judge exceeded the powers given to him by the 300th section. I would set aside the order, and I would remit the case to the District Court to be proceeded with according to law.

No costs.

WITHERS, J.—

The order appealed from appears to be contained in a journal entry of the 1st November, 1893, and is as follows:—

" Defendant will be allowed to pay by instalments of Rs. 50 per " month from the 5th instant. On failure to pay instalment on or " before 5th of each month, warrant to issue." This order was made on the occasion of the judgment-debtor in the action on the record being brought before the Court after arrest in execution of the money decree, and we were told that this was intended to be an order directing the judgment-debtor's release on terms under section 300 of the Civil Procedure Code. But this is not an order on terms at all. To be released from an arrest otherwise good is an indulgence which must be paid for. The terms must be onerous to the debtor, and not to the creditor.

Here, a creditor is made to pay for an indulgence to the debtor, which cannot be right.

The order amounts to a modification of the final decree, and that in itself stamps the order as a wrong one.

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This first part of section 305 of our Code is taken from the Indian Code, section 337, which there falls into its proper position immediately preceding section 337 (*a*), which corresponds to our section 300 before referred to. Where the latter and larger part of our 305th section has been taken from, I do not know, but it must be clearly taken into consideration when a judgment-debtor is brought into Court under a warrant for his arrest. The learned Judge gave no reasons for his order, which does not expressly direct the man's release.

1894.
August 30.
WITHERS, J.

I think the order should be set aside, and the question of the man's release or committal be further inquired into and determined.

RODE *v.* BAWA.

1896.
May 6, 8, and 19.

P. C., Badulla, 16,009.

Administration of justice by Magistrates—Inexpediency of a Superintendent of Police trying, as Police Magistrate, complaints of street nuisances and resistance to the Police.

The Superintendent of Police for the Province of Uva had been appointed Additional Police Magistrate of the Police Court of Badulla. There having been complaints of street nuisances in the town of Badulla, the Superintendent gave orders that all offenders should be arrested and prosecuted. Acting upon these orders a police officer arrested appellant, without a warrant, for committing a nuisance in his view; and as appellant resisted the arrest, he charged him with not only committing a nuisance, but obstructing him in the execution of his duty. Appellant was brought before the Superintendent sitting as Additional Police Magistrate, tried by him, and convicted on both charges.

Held by BONSER, C.J., that the conviction could not stand. The principle applicable to a case like this s that the administration of justice by Magistrates should be clear from all suspicion of unfairness. That justice should be believed by the public to be unbiassed is almost as important as that it should be in fact unbiassed.

Per LAWRIE, J.—An officer of the police cannot take part either as Judge or investigating Magistrate in cases in which members of the police are personally interested, the disqualification being not that the Magistrate has a direct interest, but that the parties before him are those over whom he has control, and in the maintenance of whose position and authority he is interested.

LAWRIE, J., would however sustain the conviction for committing nuisance, the Magistrate having had no interest in the prosecution for that offence either of a personal or pecuniary nature, and no bias either against or in favour of the accused.

THE facts of the case appear sufficiently in the judgment of Bonser, C.J.

Bawa, for appellant. The Police Magistrate belonged to the same class as the prosecutor—the police. There would be a reasonable apprehension of *bias*—actual *bias* was not suggested.

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1896. *May 6, 8, and 19.* In *Regina v. Huggins, 1895, 1 Q. B. 565*, the conviction was quashed where only one of a bench of six justices was held disqualified. Further, the Magistrate, as Superintendent of Police, had specially directed prosecution in such cases. The case, *Christoffelsz v. Slema Lebbe, 1 C. L. R. 5*, was in point.

Cooke, C. C., for respondent.

Cur. adv. vult.

19th May, 1896. BONSER, C.J.—

In this case I reserved the question raised by Mr. Bawa, as to the legality of a police officer exercising judicial functions as a Police Magistrate in a case in which a police officer subordinate to him was prosecuting, to be heard before two Judges. I desired also to have the assistance of an argument in support of the conviction, and Mr. Cooke argued the case on behalf of the Attorney-General. It appears that the Superintendent of Police for the Province of Uva has been appointed to be an Additional Police Magistrate of the Police Court of Badulla. There having been complaints of street nuisances in the town of Badulla, the Superintendent of Police gave orders that all offenders should be arrested and prosecuted. Acting upon these orders, a police officer arrested the appellant, without a warrant, for committing a nuisance in his view; and as the appellant resisted the arrest, he charged him not only with committing a nuisance, but with obstructing him in the execution of his duty, by assaulting him. The appellant was brought before the Superintendent of Police sitting in his capacity as Additional Police Magistrate, tried by him, and convicted on both charges. The question is whether this conviction can stand. There is no case exactly like this to be found in the books, for I suppose such a case never happened before. A police officer exercising judicial functions is to me a complete novelty. English Judges of the greatest eminence have repeatedly expressed the strongest disapproval of a police officer conducting a prosecution before Magistrates, on the ground apparently that the duty and interest of the police officer being to secure a conviction, he could not be expected to lay the facts before the Court in the dispassionate manner which ought to characterize the conduct of a prosecution. The principle which should be applied to a case like this is simple. The difficulty is in its application. That principle is that the administration of justice by Magistrates should be clear from all suspicion of unfairness. That justice should be believed by the public to be unbiassed is almost as important as that it should be in fact unbiassed. At this point it is right to state that no imputation of actual unfairness was made or suggested against this Magistrate

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by Mr. Bawa. I do not find in any of the cases to which I have referred in considering this question, that the Court has ever gone into the question of actual bias. The real question in these cases, as was stated by Wills, J., in *Regina v. Huggins, 1895, 1 Q. B. 565,* is this—"Was there a reasonable apprehension of "bias?" In that case, which is the latest English case on this subject, an unqualified pilot was charged with acting as a pilot after a qualified pilot had offered to pilot the ship, and was conducted by a court of six justices, one of whom was a licensed pilot, but who for forty-three years had held a position in which there was no competition between himself and the unlicensed pilots. It was held that the fact that one of the six was a licensed pilot vitiated the conviction. The Court there stated that there was no question of the Magistrate having any pecuniary interest, nor was it suggested that he had any actual bias; but the judgment was based on the principle above stated. In the present case the Magistrate is the police officer in charge of his district; he is responsible for its peace and good order. If he fails to keep his district free from crime, or at least from undetected crime, he is liable to censure from his superior officer, the Inspector-General of Police; while if he is energetic in bringing criminals to justice, he earns corresponding praise. His duty and his interest coincide in the prompt suppression of all crimes and offences and in making an example of offenders. It must be difficult for a man in such a position to assume a thoroughly impartial attitude. Mr. Cooke argued that as he would know the character of the policemen who came to give evidence before him, he would be in a better position to judge of the value and weight to be given to their evidence. But this very argument points to a ground of disqualification. It suggests that he will have preconceived opinions with regard to certain evidence. The *esprit de corps* of a police force is proverbial, and it is but natural for a superior officer to support his subordinates, especially when they are carrying out his own orders. I cannot say that an accused person, seeing himself charged by one police officer and tried by another, might not reasonably feel some apprehension as to the impartiality of the tribunal. I am therefore of opinion that the conviction should be quashed. I thus arrive at the same result as my brother Lawrie; but I go a little further than he does, agreeing as I do with what was said by the Court in *Regina v. Huggins,* "that it is far safer to enlarge the area "of this class of objection to the qualification of justices than to "restrict it." It should be remarked that cases tried summarily by Magistrates are withdrawn from the constitutional tribunal—

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1896. May 6, 8, and 19. — BONSER, C.J.

a judge with a jury—and therefore the proceedings of Magistrates sitting in summary jurisdiction have always been jealously scrutinized by the Superior Courts.

The foregoing observations apply to the case where the Magistrate is exercising judicial functions in the strict sense of the term, that is to say, when he is trying cases summarily. They do not apply with the same force to a case where the Magistrate is exercising the ministerial functions of holding an inquiry with the view of committing the accused for trial to a Higher Court.

LAWRIE, J.—

When the case was last before this Court, the Chief Justice held that it was proved that the appellant was guilty of both the offences of which he had been charged. There remains, however, the question of law, whether the Acting Magistrate was disqualified from trying the charges of committing nuisance and of resisting the police. The Acting Police Magistrate is the senior officer of police of the Province, in which he has been appointed by His Excellency to act as Additional Police Magistrate. He in his capacity of Police Superintendent had given orders to sergeants and constables to be strict about business. He had not directed the prosecution of the accused. If it be lawful for the Governor to appoint an officer of police to be an Acting Magistrate then in my opinion it was not beyond Mr. Gordon Cumming's power to try this simple charge of committing a nuisance on the public street. The Magistrate had no interest in the prosecution either of a personal or pecuniary nature. It seems to be impossible to hold that he had the slightest bias either against or in favour of a Moorman accused of committing a petty nuisance. I cannot imagine that any one could seriously think that the senior officer of police would take a different view of the evidence, or would punish more severely than the permanent Police Magistrate. With regard to the charge of resisting the police in the execution of their duty, I am of the opinion, however, that the Acting Police Magistrate was disqualified.

It seems to me that an officer of the police cannot take part either as judge or investigating Magistrate in cases in which members of the police are personally interested. The disqualification is not that the Magistrate has a direct interest, but that the parties before him are those over whom he has control, and in the maintenance of whose position and authority he cannot but be interested. Although I would sustain the conviction for committing nuisance, I am content to quash the whole proceedings. It is inconvenient to quash a part and to leave a part.

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MOHIDIN *v.* NALLE TAMBY.

1896.
March 27 and April 1.

D. C., Kandy, 9,256.

Warrant of arrest—" Court," meaning of, as used in s. 298, Civil Procedure Code—Committal and discharge of judgment-debtor—Order made in his absence, and not in Court—" Chambers," what it includes—Power of District Judge to re-issue warrant of arrest or issue fresh warrant.

Under section 298 of the Civil Procedure Code a judgment-debtor when arrested on a warrant of arrest should be brought before the Court—

Held by BONSER, C.J., and WITHERS, J., that the word " court " there meant the place where the Judge was empowered to act judicially, and was in fact so acting.

Held further, that a District Judge had no power to order the committal or release of a judgment-debtor arrested on a warrant when he had not the debtor before him.

Per BONSER, C.J.—A District Judge cannot ordinarily exercise his judicial functions elsewhere than in open Court.

Per LAWRIE, J.—(1) An order of commitment or release of a civil prisoner is a judicial act which can competently be done in chambers, and " chambers " includes the Judge's own house, if it is situated in the town where his Court is.

(2) Where a Judge finds that he was in error in discharging a judgment-debtor arrested on a warrant of arrest, and that the creditor had used due diligence in the conduct of the warrant, he may issue a fresh warrant or re-issue the old one.

THE facts of the case sufficiently appear in the judgments of their Lordships.

Dornhorst, for appellant.

1st April, 1896. WITHERS, J.—

The facts of this case appear to be as follows :—

On the 19th August, 1895, the District Judge, on the application of the proctor for the execution-creditor, ordered a warrant for the arrest of the judgment-debtor, on condition of a sum of Rs. 40 being deposited for the subsistence of the debtor from the time of his arrest till he could be brought before the Court.

That condition was fulfilled, and on the 23rd of September following the warrant of arrest was issued.

According to a journal entry in the record, dated the 23rd November (following), the Deputy Fiscal of Trincomalee produced the body of the judgment-debtor arrested under the warrant, and the Judge made and signed an order committing the debtor to prison.

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The same day the District Judge made and signed an order discharging the judgment-debtor, the reason for his doing so being that the stamp for commitment was not supplied.

On the 29th January, 1896, the execution-creditor's proctor repeated, after notice to the judgment-debtor, an application which he had made on the preceding 25th of November without such notice, for an order vacating the aforesaid order of discharge.

This application was discussed on the 10th of February following, and after hearing Mr. Beven for the execution-creditor the District Judge refused to vacate his previous order of discharge.

An appeal has been taken from the order refusing Mr. Beven's motion.

The judgment-debtor was brought under the warrant of arrest to the court-house at Kandy. The Judge was not holding Court at the time. He was in his house. The debtor was not brought before him there. Being informed by the Secretary of his Court that the judgment-debtor had been brought up, and that he had no cause to show against his committal, the District Judge made his order of commitment. It afterwards transpired that no stamp had been supplied by the execution-creditor for the warrant of committal. Thereupon (on the same day) the Judge ordered the discharge from arrest of the judgment-debtor. This was something more than vacating his order of committal.

In my opinion, the proper way to deal with this matter is to quash all the orders. The order which the District Judge refused to vacate is obviously irregular. So is the order of committal.

A judgment-debtor when arrested under a civil warrant has to be brought before the Court (*i.e.*, of issue) with all convenient speed if the judgment-debt and costs are not fully paid. What is meant by the Court? It surely means the place where the Judge is acting judicially, and is empowered to act judicially. See sections 3 and 5 of 1 of 1889.

If the Judge was acting judicially when he made these orders, the debtor was not before him. If he was not before him, the Judge had no power to order either his committal or discharge.

For this reason I propose that we should quash the two orders of the 23rd November, 1895, and of the 10th February, 1896.

LAWRIE, J.—

The District Judge of Kandy ordered the release from custody of a civil debtor arrested under a warrant against person.

The order was obeyed, the man went away.

Assuming that the order was wrong, what was the remedy?

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Relying on the analogous case of discharge in criminal cases, I am inclined to the opinion that an appeal was competent: if no appeal lay, this Court had power to revise. In either case (appeal or revision) if this Court had set aside the order of release, it would have instructed the District Judge in what way he should cause the debtor to be again brought before him, so that the parties might be placed in the same position in which they stood at the moment before the order of release was made. Instead of appealing or of asking that the order be revised, the decree-holder moved the District Court to recall its order, and this, after some delay, the Court refused to do.

It is from that refusal that this appeal is taken.

I am of the opinion that the District Judge had no power to recall the order of release: it had been acted on. Granted that the Judge had made a mistake, it was a mistake which was beyond his power to rectify, except by the issue of a warrant of arrest—and that he was not asked to do. He was only asked to cry *peccavi*. That was I think an inapt motion, one which was rightly refused. As I have just said, the plaintiff might have asked the District Judge to re-issue the warrant of arrest, and if the Judge had been satisfied that the error was his, and that the plaintiff had shown due diligence in the conduct of the former warrant, he had power to issue a new warrant or to re-issue the old one.

It seems to me that the remedy which the plaintiff sought was not a remedy, and that the order of refusal now appealed against was right.

On these grounds I was of the opinion that the appeal must be dismissed without expressing an opinion on the order of release, leaving that to be decided when the plaintiff applied for a warrant.

I was, and I am still, very unwilling to differ from the rest of the Court on the question whether the order of the release was right.

But as I am forced to give a judgment on that point I must express my opinion fully.

I understand the first objection to the order of release to be, that it was made by the Judge when he was at home, not in Court.

The order was made on a Saturday, when a Judge usually is, and certainly in my opinion ought to be, in chambers, and not in Court.

By chambers I do not mean only the stuffy little room which is all the accommodation usually given to our Judges in this hot country—I include in chambers the judge's own house, if it be situated in the town where his Court is.

Digitized by Google

1896.
March 27 and April 1.
——
LAWRIE, J.

Much judicial work is properly and legally done in chambers, and in my opinion making an order of commitment or of release of a civil prisoner is a judicial act which can competently be done in chambers, and need not necessarily be done in open Court.

So that I think the fact that the order was made on a Saturday in chambers did not invalidate it.

The next objection taken was that the parties to the action were not present before the Judge.

It was not necessary that the plaintiff should be present. When I was District Judge, it was the practice for the decree-holder to move the Court to commit, and I think some Judges used to refuse to commit a civil debtor unless such a motion was made; but the Code does not contemplate the presence of the plaintiff decree-holder; the duty is laid on the Judge to commit, unless the debtor shows sufficient cause to the contrary. The absence of the plaintiff —and he was in fact absent—would not have vitiated an order of commitment, and cannot vitiate an order of release.

The debtor was also not before the Judge. This would have been a fatal error had the Judge made an order in the debtor's favour. Against the order the debtor had nothing to say, doubtless he thought it admirable.

The decree-holder, the appellant, maintains that the Judge ought to have committed the debtor; but the Judge has shown that was impossible. The Judge could not sign a commitment which was unstamped—the plaintiff had not supplied a stamp. The jailer could not receive a prisoner for debt on an unstamped commitment. It is plain that the Judge could not have committed, and in fact he did not commit.

It is said he ought to have fallen into the old evil course of doing nothing, of delay, of postponement, against which we have been struggling and protesting for years; that the Judge ought to have postponed further consideration of the debtor's position until the following Monday, in order to give time to the plaintiff or his proctor to furnish the required stamp. Against that proposition I ventured to protest (perhaps with undue vehemency). My opinion is that the Fiscal was *functus officio* when he fulfilled the order contained in the warrant, viz., when he arrested the debtor and brought him before the Court—then the Court had to decide *quam primum* whether the man should go to prison or be let at liberty.

This was a matter affecting personal liberty, which the law greatly favours. In my opinion it would have been *ultra vires* had the District Judge ordered the Fiscal to detain the debtor. The alternative before the Judge was to commit or to release. He could not lawfully commit, because there was no stamp: he

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had no choice; he could not lawfully make any other order than that which he did make, the order of release.

For these reasons I would dismiss this appeal.

BONSER, C.J.—

The facts in this case are simple. The appellant, a judgment-creditor, obtained a warrant of execution from the Kandy Court against the person of his debtor. The warrant was executed by the Deputy Fiscal of Trincomalee, who arrested the debtor and, as required by section 298 of the Civil Procedure Code, brought him to Kandy, in order that he might, "as soon as practicable, be brought before the Court." The Deputy Fiscal with his prisoner arrived in Kandy on a Saturday afternoon when the Court was not sitting. The Judge, who was at his own house some distance away, was informed by the Secretary of the Court that the debtor had been brought to the court-house, and that he had admitted that he had no cause to show against being committed to jail. Thereupon, without having the debtor before him, he made and recorded an order committing him to jail under section 305 of the Civil Procedure Code.

At a later period of the same day the District Judge made and recorded an order discharging the debtor from custody. That order was also made in his own house, and without having the execution-debtor before him. The ground of this latter order is stated to be that the appellant had not supplied the stamp required by the Stamp Ordinance for the warrant of committal.

The execution-creditor, as soon as he came to hear of these proceedings, applied to the District Judge to cancel his order of discharge. This he refused to do. From that refusal this appeal is brought.

In my opinion the appeal should be allowed. The District Judge, not having the debtor before him, had no jurisdiction to make either an order of committal or of discharge. The Deputy Fiscal did not comply with section 298, for the debtor was never "brought before the Court." True it is that he was taken to the court-house, but that is not what is meant by the words, which mean that he must be brought before the District Judge acting judicially. Assuming for the moment that a District Judge can exercise his judicial functions in his private house, it is clear that he cannot exercise them with respect to a person who is not before him. The Cases in which the court can release a judgment debtor are specified in section 305; but they are all subject to the condition that the debtor is brought before the Court. The

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1896. *March 27 and April 1.* — BONSER, C.J.

debtor was not brought before the Court, and therefore the order was without jurisdiction.

The proper order will be that both orders be quashed.

It is said that this will be of no use to the appellant. But in my opinion any person who is prejudiced by an order improperly made by a District Court is entitled to come to this Court to have that order set aside. It cannot be said that the appellant was not prejudiced by this order, for he thereby lost the security of the person of the debtor. Moreover, so long as this order stands he may be seriously embarrassed by it in any subsequent proceedings which he might be advised to take to recover his debt.

Everything which falls from my brother Lawrie is deserving of the greatest respect, but I am not sure that I understand the expression "chambers" used in connection with a District Court. It does not occur, so far as I know, in the Civil Procedure Code, and the fact that all applications are to be made either by way of action or petition would seem to imply that they must be made in open Court. The appropriate form that applications made in chambers should take is that of summons. But it is unnecessary now to decide whether a District Judge can exercise any, and which, of his judicial functions elsewhere, than in the building appropriated by law or usage as a District Court. It was stated that Judges of the Court of Chancery in England had granted temporary injunctions at their homes and elsewhere, but the office of District Judge is not analogous to that of a Judge of a Superior Court in England. It may be that in a case of urgency amounting to necessity a District Judge might so act, but I am clearly of opinion that this was not such a case.

I wish it to be understood that my decision implies no reflection on the District Judge for being absent from Court at the day and hour in question.

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DANIEL v. RODRIGO.

1896. *January 31.*

P. C., Pánaduré, 13,728.

Toll—Ordinance No. 14 of 1867, ss. 7, 15—Superintendent of Minor Roads—Certificate of exemption.

Under section 7 of the Ordinance No. 14 of 1867 the Government Agent has no power to issue a certificate of exemption from toll of the carriages, carts, and horses of the Superintendent of the Minor Roads while used in the Public Service on the roads in charge of that officer.

THE accused was convicted under the 15th section of the Ordinance No. 14 of 1867 of taking toll from H. L. Daniel, Superintendent of Minor Roads for the Western Province, a person whom the accused had been directed by the Government Agent of the Western Province to permit to pass without payment of toll.

The certificate of exemption ran as follows :—" This is to certify " that the carriages, carts, and horses of the Superintendent of " Minor Roads are entitled to pass free of payment through all " tolls situated within ten miles of any roads in his charge, when " those carriages, carts, or horses are travelling upon the Public " Service. Granted under Ordinance No. 14 of 1867.

" A. R. DAWSON,
" Government Agent."

De Saram, for accused appellant.

31st January, 1896. WITHERS, J.—

The defendant has been convicted under the 15th section of the Ordinance of 1867 of the offence of demanding and taking toll as toll-keeper from Mr. Daniel, the Superintendent of Minor Roads, an officer exempted by the 7th section of Ordinance No. 14 of 1867 from paying toll.

The facts and the law scarcely support this judgment.

The evidence discloses that toll was taken, not from Mr. Daniel, but from his horsekeepers, who were taking a carriage and two horses of their master back to Colombo.

Mr. Daniel was at Pánaduré when toll was demanded of his servants. One of them returned and told Mr. Daniel of the detention, and he gave his horsekeeper a rupee to pay the toll demanded. The horsekeeper was given by his master exhibit C, which purports to be a certificate of exemption from toll of the carriages, carts, and horses of the Superintendent of Minor Roads

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1896. *January 31.* — WITHERS, J.

while used on the Public Service on the roads in that officer's charge. It is signed by Mr. Dawson as Government Agent and Chairman of the Provincial Road Committee.

This certificate names no one, and is, I suppose, intended for the use of the officer for the time being.

This Court has held that a Superintendent of Minor Roads is not liable to pay toll when engaged on any work on a road within ten miles of the toll station. He derives his immunity in such circumstances from the Ordinance itself.

No one appeared in support of the conviction to establish the power of the Government Agent to grant such a certificate as "C." His power is, as far as I know, limited by the provisions of section 7 of the Toll Ordinance of 1867, which enacts :—"...... and it "shall be lawful for the Government Agent, if he shall see fit so "to do, to direct the toll-keeper in writing to permit cattle or "sheep driven to grass, persons with cattle, agricultural instru-"ments, or seed grain for the cultivation of their lands, and "children going to and from school, to pass without payment of "toll ...." This certificate goes beyond these powers. What I take it Mr. Daniel should have done was to give his horsekeepers a certificate that they were taking his carriage and horses back to Colombo on a return from a tour of inspection of the roads under his supervision, or on return from supervising some particular work within ten miles of the station, as the case may be.

I think the accused was ill-advised in taking the toll under the circumstances, but he was not, as it seems to me, breaking the law, and so this judgment must be set aside, and he must be acquitted and discharged.

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